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# Beyond the New Role Morality for Lawyers

Rob Atkinson

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## Article

### BEYOND THE NEW ROLE MORALITY FOR LAWYERS

ROB ATKINSON\*

And he told them a parable also . . . . "And no one puts new wine in old wineskins; if he does, the new wine will burst the skins and it will be spilled, and the skins will be destroyed. But new wine must be put into fresh wineskins. And no one after drinking old wine desires new; for he says, 'The old is good.'"<sup>1</sup>

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\* Assistant Professor of Law, Florida State University College of Law. B.A., Washington and Lee University, 1979; J.D., Yale Law School, 1982.

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1. *Luke* 5:36-39 (Revised Standard).

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## INTRODUCTION

Conscientious lawyers and teachers of lawyers continue to face an ancient and fundamental question: Can a good person be a good lawyer?<sup>2</sup> The orthodox answer—the answer of what I will call the old role morality—has been increasingly criticized. Recently, two

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2. See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 614; Gerald J. Postema, *Self-Image, Integrity, and Professional Responsibility*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 286, 287 (David Luban ed., 1978) [hereinafter THE GOOD LAWYER]; see also DAVID LUBAN, LAWYERS AND JUSTICE 109 (1988) [hereinafter LUBAN, LAWYERS AND JUSTICE]; Stephen Gillers, *Can a Good Lawyer Be a Bad Person?*, 84 MICH. L. REV. 1011 (1986) (reviewing THE GOOD LAWYER, *supra*, and STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE (1984)); cf. THOMAS L. SHAFER, ON BEING A CHRISTIAN AND A LAWYER 32 (1981) ("Is it possible to be a Christian and a lawyer?"); Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148 (1990). But cf. Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 560 (1991) ("To ask whether one can be both a good person and a good lawyer is to ask the wrong question.").

veteran critics, David Luban and William Simon, have offered a new answer, in the form of a new role morality for lawyers. In this Article, I will argue that their answer, though a substantial improvement over the old, is fundamentally flawed. They try to fashion the limits on lawyers' conduct from public norms, essentially the same stuff from which the old role morality was cut. If we replace that material with the moral commitments of individual lawyers, we can create a workable, though not flawless, lawyers' morality—new wineskins for Luban and Simon's new wine.

## I. ROLE MORALITIES, OLD AND NEW

### A. *The Old Wine*

In its current formulation, the central question of legal ethics is usually posed as "May a lawyer always do all that the law allows for every client?" This formulation reflects the orthodox answer, which has been yes, and sometimes (particularly in the criminal defense context) a very strong yes. To do all that the letter of the law allows for clients, even if that causes considerable harm to innocent third parties, is not only permitted, but perhaps required, of lawyers. It is not just one way to be both a good person and a good lawyer; it is the one true way. Under it, Shylock may lose his pound of flesh, and Simon Legree his fleeing chattel, but not for want of a lawyer's help in securing them.<sup>3</sup> And this basic principle, the principle of partisanship, has a corollary, the principle of nonaccountability: the lawyer who advances a morally odious but arguably legal claim is not to be faulted. Together, the principles of partisanship and the corollary principle of nonaccountability constitute the old role morality.<sup>4</sup>

This traditional solvent of lawyer morality's basic issue has been

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3. These are, of course, fictitious cases. But the fugitive slave laws were painfully real, and the old role morality allowed their invocation by lawyers who thought them odious. Shylock's cause has its explicit defenders in theory, *see, e.g.*, Fried, *supra* note 2, at 1088; RUDOLPH VON JHERING, *THE STRUGGLE FOR LAW* 86-88 (John J. Lalor trans., 2d ed. 1915), and a close factual analogue in *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962). There the court assumed, without explicitly holding, that the professional codes governing lawyers did not compel an insurance company's lawyer to reveal an aortal aneurysm to an accident victim when the company's liability was at issue. *See id.* at 710. The flesh in question could scarcely have been nearer the heart, and surely weighed less than the proverbial pound.

4. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at xx. The principle of partisanship is sometimes referred to as the principle of professionalism. *See* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673-75 (1978); *see also* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 10.2.1 (1986) (discussing the principle of professional detachment from a client's social, moral, political, or economic views). Because "professionalism" has come to be used as something of a slogan in another



distilled from various sources—the demands of the adversarial system,<sup>5</sup> the advancement of individual autonomy,<sup>6</sup> the special friendship of lawyer and client<sup>7</sup>—and dispensed or analyzed under several labels—the lawyer's amoral ethical role,<sup>8</sup> the traditional<sup>9</sup> or standard<sup>10</sup> conception, the full advocacy model,<sup>11</sup> the libertarian approach.<sup>12</sup> In its purest form, this elixir is unadulterated by ordinary morality or by personal responsibility on the part of the lawyer for the concurrent rights or interests of adversaries, third parties, or the public.<sup>13</sup> The individual lawyer is sometimes permitted, and occasionally encouraged, but never required, to take these matters up with clients.<sup>14</sup>

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context, *see infra* text accompanying note 437, and because the term's positive connotations should not be surrendered without objection, I follow Luban's usage.

5. See Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160-61 (1958); *see also* Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 12 (1951).

6. See Pepper, *supra* note 2, at 614; Fried, *supra* note 2, at 1060.

7. See Fried, *supra* note 2, at 1061; *see also* Pepper, *supra* note 2, at 614 n.5 (describing his article as an elaboration and modification of Fried's position).

8. See Pepper, *supra* note 2, at 613.

9. See Fried, *supra* note 2, at 1061.

10. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at xix (following Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980)).

11. See ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 92 (1980); Paul L. Haines, *Restraining the Overly Zealous Advocate: Time for Judicial Intervention*, 65 IND. L.J. 445, 453 (1990).

12. See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1084-85 (1988) [hereinafter Simon, *Ethical Discretion*]; *see* William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 [hereinafter Simon, *Ideology*] (describing his subdivision into further categories).

13. Here I am following a distinction, firmly ensconced in the literature, between lawyers' role morality and ordinary morality. Ordinary morality comprises "the moral principles that govern people as *people*," the "ordinary conceptions of how good people or good citizens should behave." Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 118-19 (1990) (reviewing LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2). Conversely, role morality consists of the special obligations placed upon lawyers *qua* lawyers. Problems arise because (lawyer jokes aside) lawyers are people, too. The distinction is a useful shorthand for pointing out this conflict, but it blurs badly upon close scrutiny, in ways that we will take up in detail below. Suffice it to say here that ordinary morality cannot be constructed without reference to roles, *see infra* note 280, and that the sources and status of ordinary morality are anything but clear. *See infra* Part II.

14. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1981) [hereinafter MODEL CODE] ("In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible."); *id.* EC 7-9 ("However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action."). The Model Rules of Professional Conduct, which superseded the Model Code as the American Bar Association's (ABA) recommended standard for lawyerly con-

This removal of ordinary morality produces not just a purer, but also a more potent, product. The old role morality is primarily imbibed in two contexts: by new initiates in law schools, the Eleusinian mystery of the lawyer cult,<sup>15</sup> and by full-fledged members of the law fraternity in their sacramental meals, bar association banquets.<sup>16</sup> It weans the former away from the moral commitments of their undergraduate idealism, and it fortifies the latter against the moral ambiguities of practice. Like the magic mead of the mythic Norsemen, the old role morality induces something akin to a state of berserk. Partakers are steeled against cries for quarter that might otherwise distract them from wholly zealous pursuit of client ends in the chaos of courtroom combat and in the staging areas of office conferences.<sup>17</sup>

### B. *The New Wine*

Without questioning the elixir's efficacy, observers have, for a decade and a half now,<sup>18</sup> been pointing to its potentially dangerous side effects: persistent moral tunnel vision and general atrophy of

duct in 1983, is considerably less open in urging lawyers to engage in such moral dialogue with clients.

15. See Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978); see also Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3, 7, 9-10 (1991) (noting that law school classrooms extol loyalty to the client above all, and arguing that there is a need to include ethical issues in substantive courses); David W. Raack, *Law School and the Erosion of Student Idealism*, 41 J. LEGAL EDUC. 121, 131 (1991) (reviewing ROBERT V. STOVER, *MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL* (1989)) (noting that the emphasis placed on "hard legal analysis" erodes student idealism); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 617 (1985) (noting that legal education is "a socialization experience that erodes conviction at every turn"); Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL EDUC. 43, 43-44 (1991) (arguing that the failure of law schools to train students in client interaction leads to undisciplined uses of the lawyer's power).

16. See Abe Krash, *Professional Responsibility to Clients and the Public Interest: Is There a Conflict?*, 55 CHI. B. REC. 31 (special centennial issue 1973).

17. More recent defenders of the old role morality have criticized their predecessors for limiting client-oriented zeal outside the litigation context and have explicitly expanded their justificatory theories to cover the lawyer's advisory role. Pepper, *supra* note 2, at 621-24.

Lest you think my berserker metaphor excessive, see Bernard Williams, *Professional Morality and Its Dispositions*, in *THE GOOD LAWYER*, *supra* note 2, at 259, 263, particularly the discussion of specific professional adaptation.

18. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975). Wasserstrom's article began what might be called the contemporary phase of criticism, but critics can trace their roots much farther back. Their antecedents include George Sharswood and David Hoffman, two of the first systematic analysts of legal ethics in the United States; Charles Dickens in his fictional portrayals of lawyers, see generally Robert Coles, *The Keen Eye of Charles Dickens*, HARV. L. SCH. BULL., Summer/Fall 1984, at

the organs of ethical discernment, leading to atrocities against other combatants and mounting casualties among the civilian population. Some have urged that the old role morality be diluted with a dose of ordinary morality<sup>19</sup> or at least labeled with a disclosure of its potential hazards to moral, if not mental, health.<sup>20</sup> The challenge has been to formulate an equally effective tonic without the unsettling side effects. It must not be too unpalatable to the lawyers and law students for whom it is prescribed, and it must not come out of solution when subjected to analysis by legal scholars and thoughtful practitioners.<sup>21</sup>

Luban and Simon offer similar prescriptions on the basis of similar diagnoses.<sup>22</sup> Each attempts to transcend the old dichotomies of role morality versus ordinary morality, to avoid the unstable old combination of advocate for the client versus officer of the court. Drawing upon their earlier critical work,<sup>23</sup> each offers a formula for lawyers' ethics that is a substantial improvement on the old role morality.

Though their formulations differ in important respects,<sup>24</sup> Luban and Simon themselves emphasize their similarity,<sup>25</sup> and with

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30; and, of course, Socrates, particularly as depicted in PLATO, *GORGAS* (Walter Hamilton trans., 1960).

19. The classic article along these lines is Fuller & Randall, *supra* note 5, at 1159, the position of which is clearly reflected in the ABA's 1969 Model Code of Professional Responsibility. See Simon, *Ideology*, *supra* note 12, at 62 n.75. For prominent contemporary critics in addition to Luban and Simon, see Robert Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Postema, *supra* note 10; Rhode, *supra* note 15; Schwartz, *supra* note 4; Thomas Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987).

20. See, e.g., Wasserstrom, *supra* note 18.

21. Simon explains why the early efforts to blend client loyalty with concerns for larger moral issues were notoriously unstable and why the public interest component tends to sink to the bottom. See Simon, *Ideology*, *supra* note 12, at 61-91.

22. See Simon, *Ethical Discretion*, *supra* note 12; LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2. Goldman anticipated their position in important respects. See GOLDMAN, *supra* note 11, at 93; see also Simon, *Ethical Discretion*, *supra*, at 1090 n.21. Goldman's system, which focuses on the vindication of clients' moral rather than legal rights, most closely resembles Luban's position and is subject to much the same criticism.

23. Luban maintains that Simon's 1978 article, see Simon, *Ideology*, *supra* note 12, is "the first genuinely convincing critique of the dominant theory—and still the best." LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at xxi n.2. I would qualify my agreement in that assessment only by adding a point on which modesty may have estopped Luban: His own *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637 [hereinafter Luban, *Lysistratian Prerogative*], and LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, are second to Simon only chronologically.

24. See *infra* note 66.

25. See Simon, *Ethical Discretion*, *supra* note 12, at 1090 n.21; LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 167 n.13.

good reason. What they offer us is a new role morality for lawyers. It is new, because it offers an answer<sup>26</sup> to the fundamental question of lawyers' professional morality, an answer that lies between those who advocate the old role morality and those who criticize its lack of ordinary morality. On the one hand, Luban and Simon's approach omits the central ingredient of the old role morality, the premise that a lawyer is morally entitled, if not obligated, to do whatever the law allows for clients. For both Luban and Simon, the old excuse that the law allows a client to undertake a particular course of action is no longer sufficient, though it is still necessary, as a justification for the lawyer's assisting in that action. Individual lawyers must justify their actions on behalf of clients in terms of additional, and generally more restrictive, criteria.<sup>27</sup>

On the other hand Luban and Simon maintain that lawyers in their professional capacities must still do things that will give them moral pause as conscientious individuals. The flavor of zealous advocacy is thus not wholly lost. The limits on what a lawyer may properly do for clients are found by something other than a direct recourse to ordinary morality. In that sense, theirs is still a role morality.

Moreover—and now we reach what is, for me, the crucial point—theirs is not just a role morality, but a role morality that purports to be derived from mandatory, objective norms. Luban and Simon draw their new, narrower limits on what lawyers should do for clients from norms that purport to be universally binding, even as the outer boundary of the letter of the law, the standard of the old role morality, is universally binding. What Luban and Simon have given us, then, is the new wine of personal moral accountability for our actions as lawyers, but in the old wineskin of a societally defined role morality. I shall argue that the old vessel is unworthy of the new vintage, and perhaps incapable of containing it. Before turning to a detailed criticism of Luban and Simon, however, I must outline their alternatives to the old role morality and identify the problems their alternatives raise, particularly the problems attributable to their assumption of an underlying set of public norms.

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26. The "mediating position" in which I place Luban and Simon is different from, but not inconsistent with, the position that David Wasserman correctly identifies Luban as occupying, between the standard conception and "the legal realism popular in academic circles." David Wasserman, *Should A Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation*, 49 MD. L. REV. 392 (1990) (reviewing LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2).

27. See, e.g., Simon, *Ethical Discretion*, *supra* note 12, at 1083.

I shall not rehearse here Luban and Simon's reasons for rejecting the old role morality; if they have not shown the old vintage to be vinegar, they have at least accounted well for the bitter after-taste it leaves in the mouths of many of us. But, in order to understand the alternative they propose, we must look briefly at how their conception of law differs from that implicit in the old role morality.

According to the old role morality, law creates a sphere of autonomy in which individuals may act without having to account to society.<sup>28</sup> The law does not quite condone the actions that it does not condemn, but in permitting these actions it expresses a preference for individual autonomy over collectively defined "right" behavior.<sup>29</sup> That implicit preference is frustrated if a legal right goes unexercised because someone does not know what the law permits and, conversely, whenever lawyers inform their clients of what the law permits, they advance that preference.<sup>30</sup> Thus, assisting others to understand and realize their legal rights is always good,<sup>31</sup> even if this involves assisting in immoral practices like pornography.<sup>32</sup>

Luban and Simon agree that the law frequently permits actions that are morally wrong and socially harmful, but they suggest a wider variety of reasons for this phenomenon than the old role morality recognized.<sup>33</sup> Sometimes this over-permissiveness is attributable to a social recognition that governmental regulation of unwanted conduct like pornography will chill desirable activity that is easy to identify on an ad hoc basis but difficult to define generally. Magazines like *Hustler* stay on the newsstands not because their merits outweigh their offenses, but because, rightly or wrongly, the cost of banning them is deemed greater than the harm of their circulation.<sup>34</sup> In other cases, the law permits unwanted conduct simply because its eradication is not worth the cost. Either way, the realm of

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28. Simon, *Ideology*, *supra* note 12, at 40; Pepper, *supra* note 2, at 616-17; *see also* Fried, *supra* note 2, at 1073.

29. Pepper, *supra* note 2, at 616-17; *see also* Fried, *supra* note 2, at 1074-75; *cf.* Simon, *Ideology*, *supra* note 12, at 40 (arguing that on this conception of law the sovereign is indifferent to individual ends).

30. *See* Fried, *supra* note 2, at 1075; Pepper, *supra* note 2, at 616-17.

31. *See* Fried, *supra* note 2, at 1075; Pepper, *supra* note 2, at 617.

32. *See* Fried, *supra* note 2, at 1075; Pepper, *supra* note 2, at 614, 617.

33. *See* Luban, *Lysistratian Prerogative*, *supra* note 23, at 640; Simon, *Ideology*, *supra* note 12, at 41; *see also* GOLDMAN, *supra* note 11, at 28, 140; Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1540.

34. Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1566 (1988); *see* GOLDMAN, *supra* note 11, at 28; *see also* ACLU v. City of Pittsburgh, 586 F. Supp. 417, 427 (W.D. Pa. 1984) (holding that the "Mayor's threatened 'massive sweep' and 'initiation of criminal proceedings' against vendors of *Hustler* magazine, prior to a judicial determination that the Easter edition of

the legal includes not just those exercises of individual autonomy that society wishes to foster, but also some, perhaps many, activities that are too costly, for one reason or another, to forbid. The law is far too porous to filter out all socially harmful client desires.

Luban and Simon, however, point out that it does not follow that giving legal counsel that aids legally permitted but morally wrong or socially harmful activities is necessarily good. The purpose of intentionally over-permissive laws is served when government is kept out of especially sensitive areas or when excessive enforcement costs are avoided. Nevertheless, the resulting harmful activity is a necessary, or at best tolerable, evil; it is not a good. This evil could be averted, without the intrusion of the government into sensitive areas or the incurring of inordinate enforcement costs, if lawyers declined to assist in technically legal but socially harmful conduct.<sup>35</sup>

Luban and Simon's perspective on the law's purpose offers lawyers an alternative perspective on their role. They need not assist clients in serving their opponents and the public whatever unpalatable projects they can squeeze through loopholes in the law, only to unravel its fabric further in the process. Lawyers can act instead as supplemental filters, as part of a social fabric of informal controls that is much broader and less porous than the positive law alone.<sup>36</sup> Moreover, according to Luban and Simon, this supplemental screen can—and should—be woven from the very same public norms that inform the positive law.<sup>37</sup>

1. *Simon's Ethical Discretion Model.*—Simon looks to the law itself for the supplementary limits on what lawyers should do for clients. The law governing lawyers gives them great latitude in choosing the clients they represent, the claims they assert, and the tactics they employ.<sup>38</sup> According to Simon, lawyers should exercise

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*Hustler* magazine was in fact obscene, is unconstitutional because it ignored constitutionally required procedural safeguards").

35. Luban, *Lysistratian Prerogative*, *supra* note 23, at 640-41.

36. *Id.*

37. Proponents of the old role morality have a standard reply to this critique: it is the job of judges and juries, not individual lawyers, to ascertain how the law is to be applied in particular cases. If the lawyers present their respective clients' positions in the most favorable light possible, the proper result will become apparent to the tribunal. For Luban's and Simon's replies, see Simon, *Ideology*, *supra* note 12, and LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2.

38. This law is most typically in the form of lawyer regulatory codes promulgated by the highest courts of the states. It also takes the form of rules of procedure and evidence, statutes dealing with such matters as subornation of perjury, and, indeed, any

their discretion to "best vindicate our legal ideals,"<sup>39</sup> to "further justice,"<sup>40</sup> and to achieve "the most legally appropriate resolution of the matter."<sup>41</sup> Lawyers are to fashion the additional filter through which they strain client ends from the very fibers of public values and ideals that comprise the law itself.<sup>42</sup> In deciding whether to assist a client with a particular claim, a lawyer should determine not only whether the claim is technically legal, but also whether it is consistent with the purpose the law itself serves. Like a prism, Simon's discretionary approach refracts the single question of the old role morality—Is the claim colorable?<sup>43</sup>—into a wider and more clearly visible spectrum.

Against those who are skeptical about the feasibility of leaving this flexible approach in the hands of lawyers representing private clients, Simon cites the analogous decision-making styles now widely accepted as not only possible, but appropriate, for two other agents of the legal system, judges and public prosecutors. Few doubt, he points out, that judges reach principled applications of the law without recourse to the kind of formalistic, mechanical jurisprudence discredited by the legal realists.<sup>44</sup> Common law judges, under the prevailing theory of adjudication, reach principled decisions that cannot be logically deduced from existing legal authorities.<sup>45</sup> Similarly, public prosecutors are meaningfully admonished to seek justice, that to which the legal system aspires, rather than merely convictions that the letter of the law might allow.<sup>46</sup> Even if precedent and statute provide no map to the right legal conclusion, judges and prosecutors nevertheless can reach that conclusion by reference to certain fixed stars in the firmament of legal values.<sup>47</sup>

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aspect of the civil or criminal law that applies to lawyers *qua* lawyers. See WOLFRAM, *supra* note 4, at 20; see also David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801, 805-09 (1992) (identifying four basic systems of enforcing the law of lawyering); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249-60 (1991) (describing the process by which rules of the legal profession came to be enforced by agencies of the state).

39. Simon, *Ethical Discretion*, *supra* note 12, at 1084.

40. *Id.* at 1083.

41. *Id.* at 1096.

42. *Id.* at 1090.

43. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1981) [hereinafter MODEL RULES]; FED. R. CIV. P. 11.

44. See Simon, *Ethical Discretion*, *supra* note 12, at 1090.

45. *Id.* at 1090-91.

46. *Id.* at 1091 n.25.

47. In arguing from the analogy of judges and prosecutors, Simon is careful to qualify his key premise. He says that it is widely accepted among lawyers and legal scholars that judges and prosecutors make principled decisions not dictated by mechanical appli-

Equipped with similar methods of reckoning, lawyers in private practice can discern when a colorable interpretation of substantive law contravenes the law's spirit and when invocation of a particular procedure or technique, though formally in compliance with the relevant rules, nevertheless frustrates their purpose. Thus, unlike the adherent of the old role morality, the lawyer exercising Simon's brand of ethical discretion will recognize circumstances under which it is not appropriate to press a client's position to the furthest extent of the law. Yet, unlike the ordinary moralist, Simon's ideal lawyer will find those limits in the law itself, not in some other set of norms. Moreover, even when such lawyers find themselves pressing beyond the clear intent of a particular law, they will not always feel compelled to check themselves. Rather, they will recognize that ambiguities in particular laws sometimes invite them to press toward the frontiers on behalf of their clients. This will be especially true when the clients' fundamental legal rights are at stake or when the adversary system is working well enough to sift out their more dubious substantive positions and to curb their lawyers' more aggressive methods. In these cases, but not in all cases, lawyers taking Simon's tack will rely on the system rather than their own self-policing to generate the legally appropriate result.<sup>48</sup>

In using this calculus to limit the ends they pursue and the means they employ, lawyers are, in Simon's view, performing the fundamental purpose of their role. That purpose, like the purpose of the law itself, is to serve justice, which for Simon means to advance the values of the legal system.<sup>49</sup> In this way, one's function as a lawyer converges with the goal of the legal system itself in the promotion of justice. Over against the advocates of the old role morality, Simon believes that the letter of the law stultifies, but that its

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cations of the law. He notes that "this portrayal has been challenged," but he says nothing to counter the challenge that such principled decisions are in fact impossible. *See id.* at 1090. Rather, he argues that principled judicial decisionmaking and his model of ethical discretion stand or fall together. If some of the more radical critics of this view of law are right, then presumably both fall. *See* Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 9-25 (1984) (setting out the position of the Critical Legal Studies movement that law is indeterminate); *cf.* Richard A. Posner, *Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 828 (1988) (defending a less radical view of the impossibility of resolving some adjudicated issues by legal reasoning). This possibility obviously weakens Simon's position, but not in a way that concerns me in this Article. My concern is that, even if such principled decisions are possible, Simon must show why lawyers should feel bound by these principles and not others.

48. *See* Simon, *Ethical Discretion*, *supra* note 12, at 1096-1113.

49. *See id.* at 1083-84, 1119-23.



spirit gives life.<sup>50</sup> But over against the ordinary moralists, he insists on exorcising all extra-legal spirits as phantoms, if not chimeras.<sup>51</sup>

2. *Luban's Fourfold Root of Sufficient Reason*—Luban also provides a flexible method for resolving conflicts lawyers encounter between the demands of their role and the dictates of ordinary morality. Luban derives his limits on the lawyerly role morality by placing that morality in the broader setting of ordinary morality. He requires that each act purportedly required by the role be grounded in ordinary morality by a four-stage scheme he dubs "the fourfold root of sufficient reasoning."<sup>52</sup> Stated at the highest level of generality, it goes like this: "[T]he agent (1) justifies the institution by demonstrating its moral goodness; (2) justifies the role by appealing to the structure of the institution; (3) justifies the role obligations by showing they are essential to the role; and (4) justifies the role act by showing that the obligations require it."<sup>53</sup>

Luban illustrates the application of this system with the notorious Lake Pleasant Bodies case.<sup>54</sup> In that case, Frank Armani, defense counsel for serial killer Robert Garrow, learned from his client the location of the victims' bodies, visited the sites, and photographed the corpses.<sup>55</sup> But when the victims' bereaved parents asked for the locations, he declined to reveal this information, citing the rule of lawyer-client confidentiality.<sup>56</sup> In support of Armani's anguished decision, Luban argues as follows:

The lawyer's role acts (preserving the defendant's confidences, photographing the bodies but telling nobody) were required by the general duty of confidentiality—the role obligation. This is justified by arguments that confidentiality is required in order to guarantee an adequate criminal defense—the institutional task . . . . The next step is to show that zealous criminal defense is required by the ad-

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50. See *id.* at 1103-04.

51. I examine below why Simon is anxious to avoid recourse to ordinary morality. See *infra* text accompanying notes 202-208.

52. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 131-32. Luban has since regretted using the name, having come to see it as awkward and obscure. See David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to LAWYERS AND JUSTICE*, 49 MD. L. REV. 424, 427 n.6 (1990) [hereinafter Luban, *Mid-Course Corrections*]. For a similarly tiered system of justification, see MICHAEL D. BAYLES, *PROFESSIONAL ETHICS* 18-19 (2d ed. 1989).

53. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 131.

54. See *id.* at 53-54.

55. See *id.* For Armani's own account of the Garrow case, see TOM ALIBRANDI & FRANK ARMANI, *PRIVILEGED INFORMATION* (1984).

56. ALIBRANDI & ARMANI, *supra* note 55, at 94-98, 100-03, 188.

versary system, and this in turn . . . serves the positive moral good of overprotecting individual rights against the encroachments of the state.<sup>57</sup>

We will return to this particular example in considerable detail below. We can already see, however, several ways in which Luban's fourfold root differs from the institutional excuse typically given by defenders of the old role morality. For one thing, the chain of justification is longer; we do not move directly from the lawyer's status as client representative to the moral legitimacy of doing whatever the law allows for a client. For another, Luban's longer chain is carefully forged to be only as strong as its weakest link; indeed, "a weak link weakens the entire chain and several weak links together weaken it more than any single link does on its own."<sup>58</sup> Finally, for Luban, the adversary system, the very link that joins ordinary moral values like truth and individual autonomy to the lawyer's role, is never the strongest, but often the weakest, link.<sup>59</sup> In the criminal defense context, as the example quoted above indicates, Luban does find strong justifications for the adversary system, its corollary role of zealous advocate, and role obligations like client confidentiality.<sup>60</sup>

On the civil side, however, he finds the standard apologies for the adversary system deficient and concludes that it is only pragmatically justified: it is not much worse in theory than such alternatives as the inquisitorial system of continental Europe, and it is very costly to change in fact.<sup>61</sup> Like the family car my parents always refused to trade in, it may not run as well as the latest model from Europe or Japan. But it works as well as anything else that has been around as long, and all the available alternatives are costly, not least in that their foibles are unfamiliar. An adversarial system that is only pragmatically justified, however, is a very weak link in the chain of justification that connects morally questionable acts with the values the adversary system is supposed to serve.<sup>62</sup> Accordingly, lawyers are morally entitled (if not required) to examine the other links carefully and to conclude, more often in the civil than the criminal defense context, that the chain simply will not support many of the

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57. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 149.

58. *Id.* at 134.

59. *See id.* at 67-103. Not all defenses of the old role morality make the adversary system its linchpin. *See supra* Subpart I.A; *infra* Subpart III.B.

60. *See supra* text accompanying note 57.

61. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 92.

62. *Contra* Ellmann, *supra* note 13, at 143-45 (disputing this point). Luban replies in Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1020-21 (1990) [hereinafter Luban, *Partisanship*].

legally permissible but morally blameworthy ends and means that the old role morality tolerates or encourages. Thus, for example, Luban maintains that the protection of client secrets is generally too broad a justification in civil matters, and therefore those who knew of the design flaws in the Pinto gas tank<sup>63</sup> should have revealed them in violation of the rule.<sup>64</sup>

The fourfold root, then, is distinct from the old role morality both in conception and in application. It is important to note, however, that the fourfold root's departure from the old role morality is not identical with a more direct (and arguably less sophisticated) application of ordinary morality. To be sure, Luban's four step justificatory scheme bridges the gap between lawyers' role morality and ordinary morality, and in a way that seems to subsume the former under the latter.<sup>65</sup> Thus, for example, Garrow's lawyer, by refusing to reveal the locations of his victims' bodies to their parents, is promoting the goal of over-protecting criminal defendants' rights, a goal grounded in ordinary morality under Luban's fourfold root. Note, however, that an unreflective application of ordinary morality suggests a different answer and a diametrically opposed course of action: Tell the parents! Thus, although Luban's justificatory scheme grounds his new role morality in ordinary morality, its application is more complicated than, and will sometimes give very different results from, a direct appeal to ordinary morality.

3. *The New Role Morality for Lawyers.*—Luban and Simon agree that the old role morality is not necessary to achieve, or even fully consistent with, the ends it purports to serve, and that conscientious lawyers must seek a supplementary standard to bare legality. For Simon, the spirit of the law sometimes constrains us from pressing to the limits of its letter, and other times compels us to test those limits. For Luban, the justificatory link between problematic act and institutional good is sometimes too tenuous to bind us, but other times strong enough to bind us against our own better judgment of

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63. Internal company memoranda of the Ford Motor Company revealed that Ford executives were aware of the propensity of the Pinto's gas tank to leak and explode in rear-end collisions; they rejected, however, proposed modifications as too costly. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 206-10.

64. *Id.* at 206-34.

65. Indeed, one critic has charged that "Luban's discussion fails to show how lawyers, even those engaged in the most strongly justified forms of adversary practice, are ever exempt from the demands of common morality." Wasserman, *supra* note 26, at 404. This criticism, in turn, led Luban to a significant revision of his earlier position. See Luban, *Mid-Course Corrections*, *supra* note 52; see also *infra* Part III.B.

the morally right result. For both, the supplementary standard will come from objective norms: the spirit of the law for Simon, ordinary morality for Luban.<sup>66</sup>

### C. *The Old Wineskins*

This recourse to objective norms is the central problem with the new role morality that Luban and Simon offer. It is their attempt to eliminate conflicts between individual conscience, on the one hand, and the dictates of public standards, of professional role and of law, on the other. To get at this problem, we must first look at several ways in which conflicts can arise in their system. Recall that public norms impinge on that system at two distinct levels. The first, the outer limit, is positive law itself, public norms embodied in such conventional sources as statutes, administrative regulations, and judicial opinions. We have already encountered one point on this frontier, the virtually universal obligation to protect client confidences even at the risk of great harm to innocent third parties. The second, inner limit is Simon's spirit of the law and Luban's recourse to ordinary morality through the fourfold root.

Conflicts between individual conscience and public norms can and do arise at each level. Sometimes an individual may conscientiously disagree with the dictates of Luban and Simon's inner limits. At the most general level, the adherents of the old role morality are an obvious example, for they disagree with these inner limits in their entirety. Sometimes one's individual conscience may conflict with

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66. In describing their alternatives, Luban and Simon address slightly different questions and, accordingly, give slightly different answers. Simon looks for guidelines in exercising discretion, in deciding when to do less (or more) for clients than procedural or substantive law allows. Luban, on the other hand, seeks guidelines for what to do when the dictates of one's lawyerly role require conduct inconsistent with ordinary morality.

Yet, in an important sense, they differ primarily in that they are dealing with the negation of the central premise of the old role morality in slightly different versions. Recall that at the outset I said that the standard answer had a strong and a weak form. In the strong form the lawyer *must*—in the weak form, the lawyer *may*—do all that the law allows on behalf of clients. Simon, addressing the weak form, asks what is left of a specifically lawyerly role if one abandons the idea that it is always proper to go to the limit of the law for a client. Luban, reading the standard answer in its strong form, subsumes it under the larger question of when it is proper to depart from a role norm. This is simply the converse of when role norms are justified, a question whose answer, as we have seen, leads Luban to try to reconcile lawyerly and ordinary morality through the fourfold root analysis. Luban's program has, however, a positive program much like Simon's, which he sets out in a long chapter on "Opportunity in the Law." See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 148-74. There he discusses how to act within justified role norms to promote justice, and in that sense his treatment parallels Simon's discussion of how to exercise discretion.

the outer limits of the positive law, when what one feels required to do or forgo doing for a client runs afoul of what the law requires or forbids. Thus, the fourfold root presses Luban to counsel violations of the letter of the law on confidentiality in the Pinto fuel tank case,<sup>67</sup> and the spirit of the law presses Simon to countenance violation of superannuated divorce statutes<sup>68</sup> and evasion of dubious welfare eligibility regulations.<sup>69</sup>

To resolve these conflicts between the individual lawyer and the inner and outer limits of their systems, Luban and Simon import the problematic, and not always fully explicit, assumption of a set of identifiable and objective public norms. With the help of these norms, disagreements between the dictates of individual conscience and the demands of publicly defined duty are reduced to a common denominator—reduced in principle, if not in practice, as easily as halves are converted to quarters. Those who find their individual consciences out of accord with the inner limits Simon and Luban reveal can be shown that they are simply out of personal harmony with the public norms from which those inner limits are derived. Alternatively, they can demonstrate, as Luban and Simon purport to do with the entire old role morality, that the norms themselves are wrong. Similarly, those who find themselves in disagreement with the outer limits of law can in principle determine whether the law is reducible without remainder to the same objective standards of justice from which they derive their own personal moralities. But if it is not, then they can legitimately resist it. If it is, they should obey it as the embodiment of that norm, and disobedience can justly and legitimately be punished.

These are, of course, the fundamental questions of political obligation: when may the state legitimately coerce dissidents, and, conversely, when are dissidents morally bound to obey? Under the rubric of a universal set of norms, and at a fairly high level of abstraction, the answers are easy. The state legitimately may coerce, and the citizen morally must obey, when the law in question is just. Conversely, when the law is unjust, coercion is illegitimate and disobedience is morally permitted, if not required. In a sense, then, in order to resolve these conflicts, Luban and Simon need only apply this answer directly to disagreements between lawyers and law, as a special case of disagreements between citizens and law, and interpo-

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67. See *supra* notes 63-64 and accompanying text.

68. See Simon, *Ethical Discretion*, *supra* note 12, at 1116-18.

69. See *id.* at 1105-07, 1116.

late from this answer at the outer level to an analogous answer at the inner level.

This mode of resolution, however, has two serious problems, one internal and the other external. The internal problem arises when we move from the level of abstraction at which conflicts between individual consciences and public norms are in principle reducible to the common denominator of justice, and address ourselves to particular disputes. How, in a particular citizen's challenge to a particular law, do you know who is really right and who, wrong? As Socrates long ago pointed out, the very things people disagree on are whether actions and laws are just.<sup>70</sup> When both the dissident and the state invoke the same set of universal norms, one to challenge the positive law and the other to defend it, who will decide who is right, unless one party is to be judge in its own case? At the level of practical application, then, the standard theory runs into serious internal problems.<sup>71</sup>

Furthermore, this internal problem at the practical level points to a more fundamental problem at the theoretical level. How is it that conscientious individuals and the state differ in their understanding of the universal norms to which they both appeal and in terms of which they agree their dispute is to be resolved? Perhaps the norms are not as readily discernible as we might wish, leading some of us to get them wrong, a possibility we have already discussed. But there is another way to account for the disagreement. That is to wonder whether anyone is, or can be, right about such matters, whether there really is a common set of public norms out there to which ultimate appeal can be taken. To ask this question is to present the external problem with Luban and Simon's approach, to challenge the common denominator to which they try to reduce conflict between individual consciences and collective standards at both levels, the inner and the outer. To answer this question in the negative is to deny that such conflicts are ultimately reconcilable, and to affirm, on the contrary, that they are fundamental and irreducible by rational means.

This, in turn, gives a deeper, and more disturbing, concern at both levels of conflict between individual consciences and collective norms. With respect to individual disagreements with Luban and Simon's inner limits on lawyerly conduct, the problem is not that

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70. See, e.g., PLATO, *Crito*, in EUTHYPHRO, APOLOGY, CRITO (F.J. Church trans., 1956).

71. Luban nicely describes this problem in discussing Dr. King's theory and practice of civil disobedience. See David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2173 (1989) [hereinafter Luban, *Difference Made Legal*].

some of us have failed to perceive the public norm properly, but that there is no such norm. Similarly, with respect to conflicts between individual consciences and the outer limits of the law, the problem is not whether the law embodies or departs from true morality, but that there is no "true" morality that law can embody, or from which it can depart. The obligation to obey the public policy embodied in law and the legitimacy of coercing those who disobey are thus in principle much more problematic, because they cannot be said to be wrong about the true public good if there simply is no such thing.

Denying the premise of universal norms would, of course, have dramatic consequences in the realms of both politics and ethics. In the political realm, in the absence of such norms, how could we ever accept coercion of dissidents? At the extreme, must civil government grind to a halt in the face of the first crank who objects to an otherwise universally approved law? Make no mistake: In the absence of universally binding norms, that law might be the prohibition of murder. Yet, on the other hand, how could we ever resist government? To take, again, the extreme case, governments, too, get into the business of killing, internationally in the form of war, domestically in the form of genocide. In the realm of ethics, how are we, as conscientious citizens, and citizens who are also lawyers, to find guidance for our personal and professional conduct in a world without objectively ascertainable values?

These and other problems posed by abandoning the premise of objective public norms are vexing, and that fact in itself makes the premise attractive. By assuming such a set of public norms, Luban and Simon are able to sidestep or dismiss the fundamental questions raised here. But, I shall try to show, the system Luban and Simon stitch together from the fabric of universal public norms comes apart at the seams. As we have seen, their system is one of individual responsibility. What they contemplate is individual responsibility for the pursuit of collective goals and conformity with publicly imposed paradigms, not for individually determined values and orderings of values. But as individuals press, at Luban and Simon's invitation, for an account of public norms that squares with an objective standard of right and justice, they find themselves at odds with collective interpretations of those norms. Either the individual or the collective may, of course, be wrong, but there is a more radical possibility—the norms may not really be universal. In raising this possibility, their methodological individualism—the new wine of individual moral responsibility—presses upon their substan-

tive assumption of objective moral norms. And this pressure threatens to burst the old wineskin they fashioned from that assumption—their two levels of public limits on lawyer conduct.

It is fair to object that I am holding their model to an impossible standard. No normative account of politics or ethics can be proved in the abstract; it need only be shown to be better than alternative accounts. My challenge to Luban and Simon's account, then, is but a first step; I must also give at least the outline of a better account—and an account of what better means in this context.<sup>72</sup> I must also give a plausible answer to the fundamental problems of politics and ethics posed by the denial of universal norms. Thus, along with my criticism of their account, though more tentatively and in less detail, I want to suggest how a viable legal ethics can be founded on the denial of the critical assumption of their account—how new wineskins can be fashioned for the new wine Luban and Simon offer.

In Part III of this Article I will criticize in detail the models of legal ethics that Luban and Simon have erected on the premise of objective norms. Before we can question their recourse to such norms, however, we must first explore a current debate in ethical philosophy about the source of any such norms. That is the subject of Part II. Then, after criticizing their collective norms in Part III, we will look in Part IV at their (and others') distaste for a model of lawyering that is founded on radical skepticism about the existence of any such norms. That discussion will address the two problems I identified above: Can such a system have an adequate politics and an adequate ethics? In the course of that discussion, we will see that, in order to give an affirmative answer, we will have to revise our notion of what adequate ethics and politics are. This revision, in turn, will take us back to our initial, and central question: Can a good person be a good lawyer? In order to answer that question without circularity, we must first attend to the foundations of ethics and politics. We cannot know what a good lawyer is until we understand what would count as a good legal system, and we cannot know whether such a lawyer can be a good person until we have a clearer idea of what that latter notion entails.

But, having warned you of one danger of circularity, I must admit that I court, indeed embrace, another. I assume that the question "Can a good person be a good lawyer?" must be answered in

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72. See Rhode, *supra* note 15, at 639 ("'But what's the alternative?' [to the old role morality] will remain the stopping point in too many discussions of legal ethics.").



the affirmative; the only real question, then, is "How?" Explaining how will require much of what follows, but the basic notion can be given here in the form of a paradox to be unpacked later: I will count as a good lawyer one who functions in the legal system without compromising his or her own conception of being a good person. All those who meet that standard by their own lights, however, will not meet it according to mine. That answer to the central question of lawyerly morality is grounded in the reason I think I am entitled to beg the central question; I deny what both the new role morality and the old affirm, namely, that there is an objective set of norms binding on individuals. In its place, I affirm individual responsibility for choosing, not just pursuing, the good.

The picture of legal ethics that Luban and Simon paint for us is in a perspective that the Old Masters of the High Renaissance would find familiar. In Luban and Simon's picture, parallel lines of ethical thinking comfortably converge in a vanishing point like that invented by the Old Masters, a point far in the background where the seemingly irreconcilable are imagined to merge. I want to paint, or at least sketch, a picture in which the vanishing point itself vanishes, a picture in which parallel lines of ethical thought are not bent together toward ultimate reconciliation. I want to show you that this picture of the landscape of legal ethics is not too horrible to behold. It is not a flattening out of all moral viewpoints into a blurred foreground, but rather a deepening of perspective, albeit beyond the visible moral horizon.<sup>73</sup>

To criticize Luban and Simon's picture and to begin sketching my own, I must first bring our differences in moral perspective into focus. That is the subject of Part II.

## II. METAETHICAL INTERLUDE

Luban and Simon's insistence that lawyers conform to publicly defined role obligations is a statement of what moral philosophers call normative, or first-order, ethics, a statement about the content of ethical norms.<sup>74</sup> Such statements tell us what we ought to do, or

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73. I am borrowing here, though in a more figurative sense, an analogy that Luban draws between modernist painting and what he calls modernist legal theory. See David Luban, *Legal Modernism*, 84 MICH. L. REV. 1656 (1986) [hereinafter Luban, *Legal Modernism*]. I do not mean, however, to ally myself uncritically with those whom Luban identifies as the modernists of legal theory, the Critical Legal Studies movement. If normative objectivity is dead, surely more than one alternative is possible.

74. See, e.g., J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 9 (1977); BERNARD WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* x-xiv (1972).

what is good.<sup>75</sup> A set of second-order moral questions, questions of what ethical philosophers call metaethics, deals with the status of first-order statements. In this Part we will explore one such question, that of the foundation of first-order statements: whether and in what sense they can be said to be objective,<sup>76</sup> to rest on something other than individual human wills.<sup>77</sup>

### A. Three Positions

There are three basic positions on that issue that are relevant to our purposes, if not exhaustive of the possibilities: realism, interpretivism, and skepticism.<sup>78</sup> Once we have examined these positions, we will be better able both to assess Luban and Simon's

75. In thus distinguishing the right from the good, I am following Ross's shorthand for the emphases, respectively, of deontological and teleological ethics. See W.D. Ross, *THE RIGHT AND THE GOOD* 1-15, 65-74 (1930).

76. J.L. Mackie uses the term "objective" in the way that I intend it here. See MACKIE, *supra* note 74, at 15-49. Nagel uses it in a way that is somewhat different, and perhaps confusingly so. See THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986). Mackie's use, which I set out in my definition of realism below, points to the notion that objective reality is "out there" beyond human will. See MACKIE, *supra*, at 15 (referring to objective as "part of the fabric of the world"); *infra* Subpart II.A.1. Nagel's use points out that even our view of what is "out there" is in some sense always *our view*. Nagel's discussion, accordingly, deals with the general problem of trying to find a perspective outside ourselves from which to view what is "out there," and to include ourselves in the panorama. See NAGEL, *supra*, at 7. Mackie, on the other hand, is at pains to show that there are no moral values out there to see, and thus he never reaches the question of from where to view them.

77. My thinking along these lines owes more than I can feasibly acknowledge at all the relevant points to Arthur Leff's essay, Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229.

78. I am particularly indebted to Michael Walzer and Michael Moore for my tripartite division of metaethics. See MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* (1987); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989). Walzer identifies the path of discovery, the path of invention, and the path of interpretation. WALZER, *supra*, at 3. Moore speaks of realism, antirealism, and interpretivism. Moore, *supra*, at 872-73. The scheme set out here is subject, of course, to significant subdivision. Robert Nozick, for example, sets out a five-part scheme that covers pretty much the same ground. See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 555-57 (1981). James Fishkin offers seven categories, three that claim objectivity and four that do not. See JAMES S. FISHKIN, *BEYOND SUBJECTIVE MORALITY* 10-23 (1984). But Nozick may make the best case for the schematic trinitarianism he parodies: "Dyadic classifications . . . have less interest, while quadratic ones are too complicated for most people to keep fully in mind, which is why there is no holy Quadrinity." NOZICK, *supra*, at 557 n.\*.

In addition to this heuristic value, tripartite schemes do correspond to the world they describe in one important respect. Like Caesar's division of Gaul, they identify those who are close to the writer's viewpoint, those who are farthest away, and those who are in between. In my scheme, if not in Caesar's, the middle ground suffers the most distortion, as it ranges from views fairly close to mine to some rather far away, and thus covers a wide range of terrain. For more on the problem of dividing this middle

alternative to the old role morality and to understand why they have rejected other alternatives, including the one that I prefer. We will see some general problems with realism and interpretivism,<sup>79</sup> the positions they implicitly adopt, and some of the reasons they and others find the skeptical position unappealing, and even a bit appalling.<sup>80</sup>

1. *Realism.*—Realism<sup>81</sup> maintains that binding ethical norms or values are “out there,” objective and identifiable, both external to individual human wills and binding upon them. Furthermore, real-

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ground, see *infra* text accompanying notes 123-124; for further discussion of the other terms see *infra* Subparts II.A.1, II.A.2.

There is one general inadequacy in my terminology that I should address here. The particular terms I have chosen are not precisely parallel, in that they do not refer to the same aspect of the different schools that they describe. “Realism” and “skepticism” refer fairly directly to positions on the standing of moral values; “interpretivism,” on the other hand, is more descriptive of methodology. This asymmetry occurs because no single aspect adequately distinguishes the three positions. With respect to the most important aspect for my purposes, their positions on the possibility of grounding morality on something other than individual human wills, both interpretivism and realism give an affirmative answer. On the other hand, interpretivists and skeptics tend to agree, over against realists, that moral values are not “part of the furniture of the universe.” See Moore, *supra*, at 872.

79. It is far beyond the scope of this Article to disprove either realism or interpretivism. Indeed, Nozick argues, but self-consciously does not prove, that disproof in the strong sense of a logically compelling case may even be beyond the proper scope of philosophy. See Nozick, *supra* note 78, at 4-24 (contrasting “coercive philosophy” of “knockdown arguments” with “philosophical explanations,” which make “[v]arious philosophical things . . . coherent and better understood”).

80. For still other reasons, see *infra* Subpart IV.B.

81. Several overlapping or synonymous terms in current use also denote this position: naturalism, foundationalism, rationalism, intellectualism, objectivism, and “the path of discovery.” I have followed Moore, see Moore, *supra* note 78, the most direct and detailed exponent of this position in contemporary American legal scholarship, in choosing the term “realism.”

“Naturalism” is used at least as widely as “realism,” and nicely connotes the core notion of moral values being “out there” beyond human will. See BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 121-22 (1985). In the technical vocabulary of ethical philosophers, however, naturalism is sometimes used in a sense that is too narrow for present purposes. In that sense all naturalists are realists, but not all realists are naturalists. G.E. Moore’s position is perhaps the best example of the latter. See G.E. MOORE, *ETHICS* (1912). Michael Moore’s broader term lets me cover nonnaturalist realists, like G.E. Moore, without discussing them further. See Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1117, 1136 [hereinafter Moore, *Moral Reality*]. Another problem with using “naturalism” to denote the metaethical position under discussion here is the risk of confusing it with the notion of natural law in jurisprudence. While natural law jurisprudence almost certainly implies a realist moral theory, see Moore, *Moral Reality*, *supra*, at 1153; Oliver W. Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918), alternative jurisprudential theories do not similarly imply moral skepticism, a point on which H.L.A. Hart, a confirmed legal positivist, was emphatic. See H.L.A. Hart, *Positivism and*

ism maintains that these norms or values are knowable by human reason.<sup>82</sup> Realism is the metaethical position that best comports with our ordinary moral language, taking it at nearest to face value. When we say that something is right or good, on this view, we mean precisely what those words ordinarily imply: that the something in question "really" is right or good, right or good for all times and places, at least for those similarly situated.<sup>83</sup> And not only do we mean this; according to the realists, we are also correct. In a phrase

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*the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); see also Moore, *Moral Reality*, *supra*, at 1066 n.10 (arguing that not all legal positivists are moral skeptics).

"Objectivism," like "naturalism," nicely focuses on the central issue, the "givenness" of ethical norms. As we have seen, however, interpretivists as well as realists claim objectivity for moral statements, and thus "objectivism" is too broad a term for present purposes. Thus, for example, Robin West rightly describes David Luban as an ethical objectivist, though he is emphatically and explicitly not a realist of Moore's stripe. See Robin West, *Relativism, Objectivism, and Law*, 99 YALE L.J. 1473, 1498 (1990) (reviewing BARBARA H. SMITH, *CONTINGENCIES OF VALUE* (1988)). The same overbreadth infects Singer's "rationalism," see Singer, *supra* note 47, at 35-38, and Olafson's "Intellectualism," see FREDERICK A. OLAFSON, *PRINCIPLES AND PERSONS* 4 (1967). Walzer's "discovery" avoids this problem, but it is less commonly used and emphasizes methodology over ontology and epistemology. Luban's "foundationalism" not only captures the distinct feature of realism, but also has the advantage of being used by Luban in explicit contrast with his own views. But it too is less commonly used and is, moreover, a bit unwieldy.

"Realism" itself, however, is not wholly satisfactory. For one thing, I include in my realists one subclass of Moore's antirealists. See *infra* note 103. The term's primary liability is the risk that its use here will be confused with its use in two other contexts. The first of these refers to the jurisprudential school of American Legal Realism, whose primary exponents, as Moore points out, were generally moral skeptics. See Moore, *supra* note 78, at 872 n.4. The second potentially confusing context is the scholastic debate between realists and nominalists, a debate that involved very similar issues and produced recognizable antecedents of the present contenders. That Michael Moore's moral realism is indeed a lineal descendant of the Thomistic realism of the Middle Ages is clear if not explicit. See Moore, *Moral Reality*, *supra*; JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). But the relation of medieval nominalism to modern ethical skepticism is less direct. See OLAFSON, *supra*, at 15-16, 19-33 (discussing this latter relationship).

82. Realism thus has both an ontological premise, that ethical norms are "out there," and an epistemological premise, that they are knowable; critics attack both. See OLAFSON, *supra* note 81, at 4; Moore, *Moral Reality*, *supra* note 81, at 1117-25; WILLIAMS, *supra* note 74, at 12-13; KAI NIELSEN, *WHY BE MORAL?* 7 (1989). Furthermore, the two premises are related: If objective values were not out there, how could we know them; if we could not know them, how could we know they were out there?

83. Mackie is insistent on this point, in disagreement with many linguistic analysts. Skepticism, in his view, cannot give a better interpretation of the ordinary language of morality than realism. See MACKIE, *supra* note 74, at 34-35; see also WILLIAMS, *supra* note 74, at 15-19; WILLIAMS, *supra* note 81, at 120-31 (rebutting the linguistic form of skepticism). What skeptics must do, therefore, is show why ordinary language is wrong in its implied affirmations about moral reality. MACKIE, *supra*, at 19-20, 31-35. For Mackie's own account of how ordinary language fell into the error of objectifying morality, see MACKIE, *supra*, at 42-46 (describing "patterns of objectification"); *infra* notes 101-102 and accompanying text.

more popular among critics of this approach than defenders, moral values are "part of the furniture of the universe,"<sup>84</sup> at least in the sense that statements about moral values are no less true or objectively verifiable than statements of scientific or historical fact.<sup>85</sup>

But what are these objective moral values like, and how do we have access to them? David Hume noted a fundamental problem in this regard:

I cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality . . . I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as an ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it should be observed and explained; and at the same time a reason should be given, for what seems altogether inconceivable, how this new relation can be deduced from others, which are entirely different from it . . . . [T]his small attention wou'd subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relation of things, nor is perceived by reason.<sup>86</sup>

The question Hume raised is phrased variously—whether an "ought" can ever be derived from an "is"; whether prescription can ever be fully reduced to description; whether reason can bridge the

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84. See RONALD DWORKIN, *LAW'S EMPIRE* 80 (1986) (discussing "'fabric' of the universe"); MACKIE, *supra* note 74, at 16 (discussing "furniture of the world"). But see Moore, *supra* note 78, at 872 (using the phrase approvingly).

85. In Moore's words, the claim is that "[i]f one applies to moral knowledge the standards of meaning, ontology and justification thought adequate in contemporary philosophy for nonmoral knowledge, the former does not suffer at all in terms of its objectivity." Moore, *Moral Reality*, *supra* note 81, at 1152-53. I follow Moore here in defining the realists' claim to the objectivity of moral values relative to that of "hard" nonmoral facts. See *id.* at 1153. This avoids the very difficult task of further defining objectivity itself in more absolute terms. See *id.* It also obviates the need to discuss differences among realists concerning the precise way to achieve the ontological parity of facts and values. See *id.* at 1143-49. This leaves open, of course, the objection that nonmoral statements themselves lack objectivity in any meaningful sense. See *id.* at 1153.

86. DAVID HUME, *A TREATISE OF HUMAN NATURE* 469-70 (L.A. Selby-Bigge ed., 1964).

gap between facts and values.<sup>87</sup> The debate on these points is still open (and vigorous),<sup>88</sup> and I cannot close it definitively here. Nevertheless, we should note briefly two fairly common forms of response, and the issues they in turn raise.

In the first place, some realists themselves concede that the gap between is and ought cannot be filled, that moral principles cannot rationally be derived from matters of nonmoral fact. For them, the objective values are out there to be discovered, but not by inference from nonmoral facts. Rather, they are to be perceived directly, by intuition or by reason acting in a special mode distinct from its ordinary empirical methods.<sup>89</sup>

Thus, according to John Finnis, a leading exponent of this school,

When discerning what is good, to be pursued (prosequendum), intelligence is operating in a different way, yielding a different logic, from when it is discerning what is the case (historically, scientifically, or metaphysically); but there is no good reason for asserting that the latter operations of intelligence are more rational than the former.<sup>90</sup>

Thinkers of this school quite rightly point out that, even if Hume is

87. Hume made this observation as something of an aside; he quite possibly was unaware of its ramifications and the debate it would set in motion. For an argument that he did not have in mind the standard modern interpretation, which is the one I implicitly adopt, see FINNIS, *supra* note 81, at 37. See also THE IS-UGHT QUESTION 35-80 (W.D. Hudson ed., 1969) (collection of papers on Hume's treatment of the is-ought question). As Finnis notes, however, others arrived at that position soon enough. See FINNIS, *supra*, at 37. In England, the watershed was G.E. Moore's *Principia Ethica* (1903) (adopting the modern interpretation). But see NIELSEN, *supra* note 82, at 35 n.1 (arguing that Axel Hagerstrom in Sweden identified the problem before its modern discussion in England and Germany).

88. See, e.g., THE IS-UGHT QUESTION, *supra* note 87 (collection of essays on the question); MORALITY AND OBJECTIVITY (Ted Honderich ed., 1985) (essays honoring J.L. Mackie); WILLIAMS, *supra* note 81, at 132-55 (examining the nature of ethical objectivity in terms of the purported distinctions between fact and value); Alan Gewirth, *The "Is-Ought" Problem Resolved*, 47 PROC. & ADDRESSES AM. PHIL. ASS'N 34 (1974), reprinted in ALAN GEWIRTH, HUMAN RIGHTS 100 (1982) (suggesting that a more apt title might have been "The 'Is-Ought' Problem Resolved—Again?!").

Indeed, one of the most traditional of efforts, Aristotle's quest for a morally determinative human nature, enlists legal scholars who are by no means traditionalists. See ROBERTO M. UNGER, PASSION: AN ESSAY ON PERSONALITY 3 (1984) (declining to repudiate "the ascription of normative force to conceptions of fundamental human identity"); Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985) (describing the pragmatists' search for an evolving conception of ideal human nature).

89. See FINNIS, *supra* note 81, at 33, 66-67; Moore, *Moral Reality*, *supra* note 81, at 1153.

90. FINNIS, *supra* note 81, at 34.

correct that an "is" cannot be derived from an "ought," it does not follow, as he seems to have thought, that moral values are not directly apprehended by reason. It is one thing to say that "the distinction of vice and virtue is not founded on the relations of things"; it is quite another to add "nor is perceived by reason."

Yet though this is logically true, it is not without problems of its own, most particularly, how reason works in this distinctive mode. Consider Finnis's account:

At this point in our discourse (or private meditation) [the point at which we are discovering the basic forms of human good], inference and proof are left behind (or left until later [when moral laws are derived from basic human goods]), and the proper form of discourse is: "... [a candidate for basic human good] is a good, in itself, don't you think?"<sup>91</sup>

As an instantiation of this approach, Finnis discusses in detail one particular putative basic good, knowledge.<sup>92</sup> According to him, we move in the following way from the desire or felt inclination for particular knowledge—from what Hume and his skeptical successors would call a fact—to grasping that knowledge in general is inherently valuable:

Commonly one's interest in knowledge, in getting to the truth of the matter, is not bounded by the particular questions that first aroused one's desire to find out. So readily that one notices the transition only by an effort of reflection, it becomes clear that knowledge is a good thing to have (and not merely for its utility), without restriction to the subject-matters that up to now have aroused one's curiosity.<sup>93</sup>

This process crosses the gap between is and ought without a logical inference; the objective and intrinsic value of what you are in fact inclined to pursue (knowledge, in the example) simply "becomes clear."<sup>94</sup>

Such insights logically divide the world into two classes, those who have had them and those who have not.<sup>95</sup> Those who have

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91. *Id.* at 85-86.

92. *See id.* at 59-75.

93. *Id.* at 61.

94. *Id.*

95. Certifying membership in the latter class poses an initial hurdle with respect to the purported intrinsic goodness of knowledge. We must be careful to distinguish those who deny the goodness of knowledge, who are probably as scarce as those who denied

seen the light need no further proof; the insight is, as Finnis describes it, as irreducible as a sense perception. The problem, however, is not that they have seen something, but whether what they have seen is the kind of externally existing moral value they claim. How can they know that their perception of intrinsic goodness corresponds to something in an external world of moral values any more than, say, an alcoholic's pink elephants correspond to something in the external world of sensory objects? One answer is to import God as the guarantor of the moral vision.<sup>96</sup> This way, however, only moves the problem back a step: How do you know that it is God who guarantees that your moral vision is clear? Mystics tell us that direct contact with the Ultimate is unmistakable. But it tends to be ineffable as well. Again, they can only point us in the right direction and, in their own darker moments, wonder not whether they have really touched the Ultimate, but what the Ultimate really is.<sup>97</sup>

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the sportiness of the emperor's new clothes, from those who deny that knowledge's goodness is intrinsic and objective. One may deny the intrinsic goodness while affirming the goodness on any of several grounds, including the usefulness of knowledge as a means to other ends, or the bare fact that one chooses to pursue it. The critical question is thus not whether knowledge is good, but whether it is *intrinsically* good, and how it adds anything useful to say that this inherent goodness is directly perceived by reason in a unique moral mode.

This is not to say that Finnis invidiously chose a tendentious example. All the items on his list of intrinsic goods are, like knowledge, very widely thought to be good: life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion. *Id.* at 85-90. This is precisely what one would expect if one thought that Finnis had blurred the line between the "is" and the "ought" by mistaking the desired, the things that people as a matter of fact generally do seek, for the desirable, the things that they ought to seek. See *infra* text accompanying notes 101-102 (discussing Mackie's error theory).

96. This, ultimately, is Finnis's way. See *infra* text accompanying notes 360-370 (discussing Finnis's political theory and its ultimate reliance on divine revelation).

97. A different, but related, answer is to import God, not as the guarantor of our vision of the ultimately and inherently good, but as the source of the good. Under this approach, God does not merely reveal what is good, he declares it. In the language of linguistic analysis, God's moral language consists of performative utterances. See Leff, *supra* note 77, at 1231. This position is logically unassailable, because it can be made a matter of definition: God, the Unevaluated Evaluator, is He Who declares what is good; good is what He declares it to be. This answers Socrates's question to Euthyphro head on, see PLATO, *Euthyphro*, in EUTHYPHRO, APOLOGY, CRITO, *supra* note 70, at 11: the good is good because God loves it; he does not love it because it is good. This is the answer favored in the Middle Ages by the Ockhamists, over against the Thomists, whom Finnis follows, and it has its adherents today. See OLAFSON, *supra* note 81. It shares, however, the problem of certifying the revelation, and it raises a new problem. The standard objection is that it makes the good quite literally arbitrary, determined by the will—the *arbitrium*—of God. Nevertheless, for our purposes, it qualifies as realism, because it gives a standard of goodness independent of the will of humans.



Another answer is to insist that I have placed too great a burden of validation on the realists and their moral perceptions, that I am trading at their expense on an unwarranted distinction between the "hardness" of physical facts and the "softness" of values. This distinction, so the argument runs, rests on a naive, and erroneous, understanding of what physical phenomena are and how they are perceived.<sup>98</sup> This response has an appealing symmetry about it. Against the objection that the perception of values is peculiar, the response is that, on close analysis, the perception of facts becomes equally peculiar.<sup>99</sup> In a world of quarks and quantum mechanics, things may well not be quite what they seem.

Even so, however, the question remains: Are things as they are in the realms of physics, history, and the like, of the same order, and knowable in the same way, as the values that realists purport to find in the world? To show that they are, realists must disabuse us of "the stubborn intuition that particular factual judgments are 'given' by observation in a way that particular moral judgments are not."<sup>100</sup> Claims in the factual realm, after all, are submitted both in principle and in practice to the judgment of the conscientiously skeptical.

But, on the other hand, what are the conscientiously skeptical to make of these facts: first, that our ordinary moral language bristles with implications of objective morality; and, second, that Finnis and others report rational contact with real values in the world? To take the latter first, it will hardly do to deny the data, particularly in light of the notorious difficulty of proving a negative. In the absence of disproof, perhaps the best we can do is offer a plausible alternative account.<sup>101</sup> Perhaps what realists see—and really see—is not a realm of moral values outside themselves, but a projection of their own or others' values upon the world, a projection induced not by the effects of drugs on the brain, but by the effects of social conditioning upon the conscience. Ordinary language simply reflects the fact that we have long mistaken this projection of ourselves for a discovery of something other, just as it reflects our more readily discredited geocentricism in expressions like "sunrise" and "sunset."<sup>102</sup> On this view, it comes as no surprise, nor any metaethical

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98. Moore, *Moral Reality*, *supra* note 81, at 1117-36.

99. Mackie anticipates this response and notes its symmetry, which he describes as "look[ing] for companions in guilt." MACKIE, *supra* note 74, at 39.

100. Moore, *Moral Reality*, *supra* note 81, at 1113.

101. This account follows that of MACKIE, *supra* note 74, at 42-46. For a parallel account of Christian theology, see LUDWIG FEUERBACH, *THE ESSENCE OF CHRISTIANITY* (1957).

102. As Bernard Williams points out, "If we are engaged in a fraudulent or self-de-

problem, that when we stare down into the inky waters of morality, we see what seems a familiar face. The problem only arises when we are moved to declare the face ideal, or when we become convinced it has an existence apart from our own.

Once again, I am not asserting that the position of the realists has been, or even can be, disproved. But we are on notice that these claims are problematic, and we are entitled to wonder whether the realists' efforts to defend them are worth the energy. In particular, we may legitimately question whether morality cannot be built on another foundation.

2. *Skepticism*.—One response to the claims of moral realism is skepticism,<sup>103</sup> of either a more or a less thorough-going sort. In its

ceiving business of reading our values into the world, our language is likely to be deeply implicated." WILLIAMS, *supra* note 81, at 130.

103. Here again, although I might have chosen another label, skepticism has several advantages. For one thing, it captures the critical difference from realism on the question of the objectivity of morals: realism affirms it; skepticism is, well, skeptical. What is more, skepticism is fairly widely used to denominate the position I am setting out here. J.L. Mackie, in particular, has both defined the term nicely and distinguished among possibly confusing uses. See MACKIE, *supra* note 74, at 15-17.

Other possible labels are subjectivism and voluntarism. Subjectivism has the advantage of directly pointing to the position's rejection of objective values and norms, but it is susceptible to confusion with other positions, particularly with relativism, which I distinguish below, see *infra* note 112, and emotivism, a theory about the meaning, as opposed to epistemological and ontological standing, of ethical statements. Compare MACKIE, *supra* note 74, at 17-18 (warning against the latter confusion) with WILLIAMS, *supra* note 74, at 13 (falling into it).

Voluntarism has the advantage of pointing to a positive feature of the position I am defining, rather than emphasizing its negation of the realist premise; the only possible basis for a moral system is, or may be, human will. See OLAFSON, *supra* note 81, at 14-15. Moreover, voluntarism is widely used to describe the position I label skepticism. See *id.* at 14 ("The most familiar label for this tradition or counter-tradition in moral philosophy is 'voluntarism.'"). Voluntarism in the sense that is synonymous with skepticism, however, must be distinguished from at least two fairly common alternative senses. The first is the much broader sense used to describe a number of theories about the freedom of the will. *Id.* at 15. Second, and more narrowly, voluntarism refers to the position in theological ethics maintained, for example, by William of Ockham, that God's will is not bounded by any rational necessity in its determination of what is good. *Id.* at 22-23. Drucilla Cornell preferred the term "decisionism," which covers much the same ground as voluntarism without the unwanted baggage, but it is not in widespread use. See Drucilla Cornell, *Towards a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 300 (1985).

My skeptics include some, but not all, of those whom Moore calls antirealists. See Moore, *supra* note 78. Specifically, I include those whom Moore identifies as skeptics and those he places in the subjectivist branch of idealism, but not those in his conventionalist branch of idealism. See *id.* at 880-81. I place Moore's conventionalists either among the realists, for affirming moral values not based on individual human volition, or among the interpretivists, for sliding into realism by privileging the conventional as the good. See *infra* Subpart II.A.3. I do not precisely distinguish skeptics from subjectivist

more aggressive mode, skepticism denies in principle the possibility of moral truths.<sup>104</sup> The claims of the realists are to be not just doubted, but denied; they are not just unproved, but false. In its milder form, moral skepticism implicitly adopts the logic of what in law is known as the Scottish verdict—to show that someone's case is not proved is not to have disproved it.<sup>105</sup> As we have seen, the realists' claims that rest on special forms of knowing are especially difficult to disprove in principle. After all, the more modest skeptic admits, some day the scales may fall from my eyes, allowing me, too, to see the ineffable and underived light of moral truth. Until then, however, we must live by our own lights, even if they fail to reveal a moral code in the order of the cosmos.<sup>106</sup> The common element in these two forms of moral skepticism, the mild and the aggressive, is the rejection, tentatively or tenaciously, of an objective moral realm external to the human will.

So stated, skepticism has not only a negative, but also a positive, or at least potentially positive, aspect. Denying moral standards external to the human will leaves open the logical possibility of grounding morality in the will itself. Yet this is only a potentially

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idealists, primarily because the distinction between them in Moore's scheme—whether they deny that moral entities exist at all, or affirm that moral entities exist, but only in individual minds—is more refined than necessary for my purposes. See Moore, *supra* note 78, at 880-81. For my purposes, it is enough that both deny the existence of binding norms outside the individual.

104. MACKIE, *supra* note 74, at 16; see also SIMONE DE BEAUVOIR, *THE ETHICS OF AMBIGUITY* (Bernard Frechtman trans., 1948); JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* (Hazel E. Barnes trans., 1956).

105. The relation of this mild form of skepticism to the more aggressive form parallels the relationship between agnosticism and atheism in matters of theology. Like mild skepticism, agnosticism rests on a verdict of not proved, rather than one of disproved or not provable. See Thomas H. Huxley, *Agnosticism and Christianity*, in *ESSAYS UPON SOME CONTROVERTED QUESTIONS* 449, 450 (London, MacMillan 1892).

106. This position is captured, albeit in a religious rather than an ethical context, in the first stanza of Hardy's poem "The Impercipient":

That with this bright believing band  
I have no claim to be,  
That faiths by which my comrades stand  
Seem fantasies to me,  
And mirage-mists their Shining Land,  
Is a strange destiny.

Thomas Hardy, *The Impercipient*, in 2 *THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 1740* (5th ed. 1986). Hardy goes on to wonder, in the next stanza, "Why always I must feel as blind/ To sights my brethren see." *Id.* The note of forlornness presages the metaphysical forlornness of the existentialists, and differs markedly from the exuberant iconoclasm of Nietzsche. See JEAN-PAUL SARTRE, *EXISTENTIALISM* 25-28 (Bernard Frechtman trans., 1947).

positive aspect; it is only to say that if moral values exist at all, they are grounded in the will.

To affirm the position that moral values do exist, grounded in the will, is to move beyond skepticism to what I will call fideism,<sup>107</sup> a kind of Cartesian<sup>108</sup> ethical system. I may (and I do) doubt that things come with value attached or built-in and that, as Art Leff puts it, an Unevaluated Evaluator confers it upon them.<sup>109</sup> But I cannot doubt that I myself evaluate things, in the sense of judging them worthy of my time and talents.<sup>110</sup> My very belief in their worth, not in the sense of acknowledging their objective value, but in the sense of committing myself to their realization, gives them their worth in the minimal, Cartesian sense that fideism requires.<sup>111</sup>

We will examine more fully in Part IV whether this minimal sense of value can give human life enough meaning and purpose to support a moral system in general and a system of legal ethics in particular. I put forward the possibility here not to defend it in detail, but to anticipate the objection that skepticism logically leads to either of two very different metaethical positions.

Some, lapsing in their logic, suggest that skepticism leads to the first of these other positions, relativism, the notion that one first-

107. I choose the term "fideism" to suggest a parallel in the field of ethics to Kant's famous dictum about metaphysical theology: "I have therefore found it necessary to deny *knowledge*, in order to make room for *faith*." IMMANUEL KANT, *CRITIQUE OF PURE REASON* 29 (Norman K. Smith trans., 1933). Though Kant was not a fideist in this ethical sense, his ethical writings mark a pivotal point in the shift away from realism. See OLAFSON, *supra* note 81, at 37-44. I mean to suggest more than just an analogy between ethical and religious thought, a suggestion I will take up more fully later. See *infra* note 403; text accompanying notes 472-474. Faith in this ethical sense is not wishful thinking; it is active commitment.

108. See RENE DESCARTES, *DISCOURSE ON METHOD* (L. LaFleur trans., 1950).

109. See Leff, *supra* note 77, at 1230-31.

110. See HAZEL E. BARNES, *AN EXISTENTIALIST ETHICS* 27 (1967) (noting the universality of evaluation).

111. *Id.* Barnes, Olafson, and de Beauvoir have all built ethical systems, similar to what I am outlining here, on the basis of an existentialist metaphysics of human personality. See *id.*; OLAFSON, *supra* note 81; DE BEAUVOIR, *supra* note 104. That foundation is not necessary, however, and it may even prove problematic, because too close a linking of freedom as the essential human condition with freedom as the basis of an ethical system verges on deriving an "ought" from an "is." To show that autonomy is the essential human condition is not to show that it, or its cultivation or exercise, is good *per se*. *But cf.* BARNES, *supra* note 110, at 26 ("If one accepts freedom as a fact, then no act is ethical which acts as if men were not free."); DE BEAUVOIR, *supra*, at 58 (stressing "the importance of that universal, absolute end which freedom itself is"). On the mistake of confusing autonomy as a prerequisite to ethics with autonomy as the goal of ethics, see Luban, *Partisanship*, *supra* note 62, at 1035-42. I wholeheartedly concur with Luban's conclusion: "I see no intrinsic value to autonomy." *Id.* at 1037. It would, indeed, be peculiar to call one who sees such intrinsic value a metaethical skeptic.

order moral position or system is just as good (or right or true) as any other. To say that all values are groundless (or, more precisely, grounded only on human will), however, is not to say that all things capable of being valued should be valued equally. Indeed, to make the latter claim is implicitly to deny the skeptical premise, for that claim implies a position of moral certitude, a "midair" position morally superior to the contending moral claims, from which perspective each is declared good. The central tenet of skepticism, by contrast, denies, or at least calls into fundamental question, the very existence of any such metaethical high ground.<sup>112</sup>

Just as fideism must be distinguished from its logically illegitimate sibling, relativism, so it must be distinguished from its suicidal twin, nihilism.<sup>113</sup> To draw the latter distinction we must backtrack a bit. Recall that, although the derivation of relativism from skepticism is logically flawed, the derivation of fideism from skepticism is not logically compelled. Relativism wrongly suggests that from skepticism necessarily follows the conclusion that one substantive moral position is as good as any other. Nihilism rightly points out that from skepticism precisely nothing positive necessarily follows.<sup>114</sup> Skepticism is a necessary, but not a sufficient, condition of fideism. The next move, on the very premises of skepticism, is not a matter of logic, but of choice.<sup>115</sup> Fideism's move is affirmative; it

112. This critique of relativism, and particularly its purported derivation from skeptical premises, is drawn from fuller critiques in GOLDMAN, *supra* note 11, at 8-15, and WILLIAMS, *supra* note 74, at 20-29. This "midair" position—Williams's term, *see id.* at 29—is not to be confused with the position of skepticism itself. Cf. David Luban, *Epistemology and Moral Education*, 33 J. LEGAL EDUC. 636, 657 (1983) [hereinafter Luban, *Epistemology*]. Somewhat confusingly, Goldman refers to his critique of what Williams calls "vulgar relativism" as a "refutation of skepticism." GOLDMAN, *supra*, at 13. This is a semantic, not a substantive, difference.

113. In thus distinguishing nihilism from its parent, skepticism, and its sibling, fideism, I am following Singer. *See* Singer, *supra* note 47, at 3-4; *see also* BARNES, *supra* note 110, at 98; DE BEAUVOIR, *supra* note 104, at 10. Nozick implicitly raises the question I address here in his statement of the nihilist position: "There do not exist any values or true ought statements (and there cannot?)." NOZICK, *supra* note 78, at 555. If you answer that there cannot be, you move from skepticism to nihilism.

114. *See* DE BEAUVOIR, *supra* note 104, at 57. De Beauvoir explains: "The nihilist is right in thinking that the world *possesses* no justification and that he himself is nothing. But he forgets that it is up to him to justify the world and to make himself exist validly." *Id.*; *see also* MACKIE, *supra* note 74, at 34. This point is also made by those who would "defuse" skepticism. *See, e.g.,* WILLIAMS, *supra* note 74, at 29. Moore is quite literally emphatic about this point: "Nothing that could be called a normative theory follows from moral skepticism." Moore, *Moral Reality*, *supra* note 81, at 1070-71.

115. Though I have described nihilism as an alternative to fideism, it may not be experienced as an active choice, but as a mishap, as the loss, rather than rejection, of meaning and purpose. *See* PAUL TILlich, *THE COURAGE TO BE* 46-51 (1952) ("The Anxiety of Emptiness and Meaninglessness"); WILLIAMS, *supra* note 74, at 1 (identifying two

chooses to believe in, in the sense of being committed to, something.

But there is another, negative, possibility, and that is to deny that anything matters. This is the turn that nihilism takes. As Yoda<sup>116</sup> and the Prince of Denmark will tell you, the pull of this, the Dark Side, is strong. Yet you do not necessarily ally yourself with the Dark Side when you begin to wonder whether there is any moral Force out there to be with.<sup>117</sup> From the position that "there are no moral absolutes, no objective measures of the right and the good," it does not follow that "nothing matters," that "all is vanity and a striving after wind."<sup>118</sup> Indeed, implicit in the position I have described as fideism is the affirmation that something does matter—what you are committed to. At that most minimal level, for example, this discussion matters to me, who wrote it, and to you, who are reading it. (And beyond that, it is but a short step for what I say to matter to you, and for what you say to matter to me.<sup>119</sup>)

With this distinction between nihilism and fideism in mind, I can correct a possible misunderstanding of something I implied in Part I and anticipate an objection I will address in Part IV. In Part I, I referred repeatedly, and with at least implicit acquiescence, to the claims of ordinary morality, its goods and its goals; in this Part, I have suggested that those goods and goals are without any external foundation. These two positions are discordant, but they can be harmonized. Even if the moral skeptics are right on the metaethical issue, and the moral score is not to be transcribed from the music of the spheres, it does not follow that every note sounded by ordinary morality over the centuries is sour.

You could, of course, opt for the self-induced moral tone deafness of the nihilists, or you could follow Nietzsche's invitation to compose on a value scale of your own creation, perhaps with partic-

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forms of amorality, one of which is expressing "despair or hopelessness," the other, "sounding a more defiant note"). But see NOZICK, *supra* note 78, at 558 ("A depressed person not only chooses to be affectless—he chooses that the world correspond and be valueless too.").

116. See *THE EMPIRE STRIKES BACK* (Lucasfilms Ltd. 1980).

117. See also *infra* Subpart IV.B. But see UNGER, *supra* note 88, at 12 (describing skepticism as brushing with nihilism when it goes so far as to reject "any hope of objectivity beyond human communities and their contingent histories").

118. *Ecclesiastes* 1:14-15 (Revised Standard). This realization is the "baphometric Fire-baptism" that Carlyle's Dr. Teufelsdröckh experienced in the Rue Saint-Thomas de L'Enfer, where he turned from the "Everlasting No" of nihilism toward the "Everlasting Yea," a form of fideist self-affirmation. THOMAS CARLYLE, *SARTOR RESARTUS* 127-28, 138-49 (J.M. Dent & Sons, Ltd. 1973).

119. See *infra* Part IV for a discussion of Socratic friendship.

ular emphasis on percussion.<sup>120</sup> But you could also follow fideism in a different direction. You could compose a moral score of your own with not just notes, but phrases and leitmotifs, borrowed from ordinary morality but transposed into a skeptical key and recombined into a new song, a song to which no one but you (and perhaps your friends) need march—or dance.

3. *Interpretivism*.—Realists, we have seen, insist on a world of hard moral reality outside human will; skeptics doubt, or even deny, the existence of such an external moral world. Interpretivists try to have the best—and avoid the worst—of both positions. From their perspective, they have transcended a tired old philosophical dualism and salvaged a binding, public, and objective morality from the bleak conclusions of skepticism without resort to the metaphysical and epistemological oddities of the realists.<sup>121</sup>

It is in this metaethical middle ground that Simon and Luban have chosen to erect their new role morality.<sup>122</sup> If it is fairly easy to define interpretivism in relation to realism and skepticism, it is virtually impossible to give a positive, descriptive account of interpretivism in its own right. If the interpretivists are united in what they want to avoid and, at least in broad outline, in what they want to achieve, they are deeply divided on how they propose to go about it.

For our purpose, however, defining them in terms of what they try to do will suffice; our purpose is to see the difficulties they have

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120. *Hear, e.g.*, RICHARD STRAUSS, *ALSO SPRACH ZARATHUSTRA* (RCA-Victor 1990); *cf.* WALZER, *supra* note 78, at 8 (describing this approach as “more frightening than attractive”).

121. Moore’s entire article is a response to the interpretivist view that the debate between realists and antirealists—terms that roughly correspond to my realism and skepticism—is meaningless or insignificant. *See* Moore, *supra* note 78, at 872-73. In large measure this Article is my response in the more limited area of legal ethics. In siding with Moore on this point, I am in a sense playing both ends against the middle: I, a moral skeptic, am taking comfort in the views of Michael Moore, a realist, against the interpretivists. It is also possible to play the ends against each other. Thus, for example, James Fishkin argues that, given the realists’ impossible demands on objectivity, skepticism and its problems inevitably follow unless we find some middle ground. *See* FISHKIN, *supra* note 78, at 129.

122. Luban is especially and explicitly critical of what he calls “foundationalism,” which is basically the equivalent of my realism. *See* David Luban, *The Misuse of Objectivity in the Foundations of Politics, Language, and Knowledge* (1974) (unpublished Ph.D. dissertation, Yale University) [hereinafter Luban, *Misuse of Objectivity*]. Luban is also rather explicitly an interpretivist. *See, e.g.*, Luban, *Epistemology*, *supra* note 112, at 652 (approvingly comparing Aristotelian ethics to manners, in that both refer to what is appropriate under community standards). As to Simon’s interpretivism, *see infra* Subpart III.A for a discussion of his view of justice and legality, especially his reliance on Dworkin.

in meeting the task they have set for themselves.<sup>123</sup> Trying to prove that this middle ground is a mirage would take us beyond my present purpose, and beyond the mild form of skepticism I identified and espoused above.<sup>124</sup> What I mean to do here is show how unstable this middle ground is, as a prelude to more particular criticisms of the foundations that Simon and Luban try to build upon it.

The middle ground of interpretivism is a continental divide that slopes steeply down to realism on one side and to fideism on the other; walking the dividing line makes extreme demands on interpretivists' intellectual equilibrium. On the one hand, interpretivists tend to fall into realism, in any one of several related ways. They may assume or suggest that our "shared" values are as they should be, or at least are not subject to further analysis.<sup>125</sup> Similarly, they may maintain or imply that considered opinions about moral matters, the perspective of "reflective equilibrium," is objectively superior to other perspectives,<sup>126</sup> or that matters as to which some (or most, or all) members of a community agree are morally binding.<sup>127</sup> In all of these ways, they risk implicitly elevating an "is" to an "ought," importing a judgment that a particular state of affairs not only is the case, but also is good. In so doing, they invite Hume's polite puzzlement<sup>128</sup> and Leff's insistent "Sez who?"<sup>129</sup>

Interpretivists may answer by asserting that "we say," where "we" are those who share a set of common convictions about values. Interpretivism, then, becomes a process of revealing and systematizing common moral convictions, a process of organizing the data

123. In defining interpretivism in terms of its effort to transcend the realist-skeptic debate, I am following Moore. See Moore, *supra* note 78, at 873 n.5, 890-92. For a detailed taxonomy of interpretivism, see *id.* at 873, 891-92.

124. Michael Moore's criticism is more ambitious. See Moore, *supra* note 78.

125. Michael Walzer seems to take the latter view. See WALZER, *supra* note 78. The former is the approach of the pragmatists and their progeny. See Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1176 n.109 (1980) (expressing hope that objective ethics can be interpreted as "deep or coherent moral consensus"); see also EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 267-72 (1973) (noting the tendency to take the American way of life as a normative concept, begging the question of how this is known); Ellmann, *supra* note 13, at 129 (arguing that even if general agreement on moral matters were achieved, "[w]hether what most people accept as moral is actually 'right' would [also] have to be decided").

126. See Leff, *supra* note 77, at 1238-39 (noting that this is the position of the Rawlsians and demonstrating that it involves an implicit, and ungrounded, preference for reasoned discourse).

127. This is Dworkin's approach. See DWORKIN, *supra* note 84; *infra* text accompanying notes 372-380.

128. See *supra* Subpart II.A.1 for a discussion of Hume's is-ought question.

129. See Leff, *supra* note 77, at 1230.



of our shared moral experience into a more coherent whole. But if interpretivists take this tack, they run a dual risk. The first risk is that of leaving the path of ethics for a special branch of cultural anthropology, a purely descriptive exercise that recounts the shared views of a particular community without claiming any normative force for those views. On the other hand, if they stay on the path of interpretivist ethics and try to give those views any normative weight, they run the risk of falling into the fideist form of skepticism.<sup>130</sup> By focusing on moral common ground, they tacitly admit that their moral system binds only those who find themselves in agreement with it, and binds them only on the basis of their individual assent. This is a viable alternative for interpretivists, as it is for others, but it returns them to the problem with which we began. If they abandon an objective basis for morality by tacitly admitting that their conclusions rest only on their own individual commitments to them, then on what grounds can they claim that those who disagree are morally bound?

### B. *From Metaethics to Role Morality*

Now we are in a better position to see why the problem of public norms implicit in Luban and Simon's new role morality requires a brief excursion into metaethics. They need a common denomina-

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130. A variation of this is James Fishkin's invitation to occupy a metaethical middle ground that makes more modest demands of objectivity than either realists, on the one hand, or skeptics, on the other. See FISHKIN, *supra* note 78, at 12-13, 32-35, 129-39. His requirement of minimal objectivity is that ethical questions be considered "in a reasonable manner from what we regard as the appropriate perspective"—liberalism's impartiality toward claims and interests. *Id.* at 130, 140. But he gives us no reason for adopting that perspective or for thinking it more reasonable than others, except that it takes account of the skeptical critique of realism. He also claims that it delivers us from skepticism itself, but it is hard to see how it does so except through something like a fideist affirmation of the foundations of liberalism. See George C. Freeman, III, *Liberalism and the Objectivity of Ethics*, 47 LA. L. REV. 1235, 1251-52 (1987) (reviewing FISHKIN, *supra*) (noting Fishkin's failure to account for why his manner is reasonable and how his perspective is appropriate). Bernard Williams's account of objectivity in ethics also depends on a practical convergence of what people actually desire and what they live as the good life, on a "shared way of life." See WILLIAMS, *supra* note 81, at 152-55, 171; see also GOLDMAN, *supra* note 11, at 15-16 (suggesting that disagreements between conflicting moral systems can and should be reconciled by reasoning from agreed cases and shared principles under the constraint of consistency); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548 (1988) ("[R]epublican theories tend to be united by four central commitments, and in any event it is in these commitments that the contemporary appeal of republican thought can be located." (emphasis added)); Cornell, *supra* note 103, at 379-80 (arguing that commitment to a regulative ideal of dialogism and citizenship, though "without the promise or security of rational guaranty," is not to be confused with "the denial of the cognitive status of value judgments").

tor of public norms to resolve conflicts between individual conscience and the two levels of public limits on lawyerly conduct that their system incorporates. Of the three metaethical positions we have seen, only two, realism and interpretivism, hold out the promise of such norms. Yet it is not clear that either realism or interpretivism can deliver on that promise, in view of the problems I have identified in this Part.

It bears repeating that to raise these problems is not to disprove the existence of binding public norms. Nor would it be appropriate to place on Luban and Simon the burden of proving that these problems are remediable. For the most part, they do not directly address these problems in their writings on the new role morality, and that is hardly a fatal omission. They instead tend to assume the existence of a fundamental set of public norms and to erect their system on that foundation.<sup>131</sup> Without further examining the soundness of the foundation, we can question whether leaving fundamental problems unresolved gives rise to problems elsewhere in their conceptual edifice, problems that could be avoided by starting from a position of metaethical skepticism. We will try to find answers to that question in the next Part, where we examine Luban and Simon's system in more detail.

### III. OBJECTIVE OBLIGATION AND THE NEW ROLE MORALITY

#### A. *The Law Writ Large: Simon's Ethical Discretion Model*

Simon claims not only that the spirit of the law is intelligible to lawyers as well as to judges and other public officials, but also that lawyers should take that spirit as their guide.<sup>132</sup> Thus, we reach the critical turn Hume described: Given, for the sake of argument,<sup>133</sup> that the law has an intelligible spirit that we could take as our guide, ought we to follow that guide, and if so, why? How do we get from the "is" of the law's spirit to the "ought" of our obedience to it?

Simon offers the most direct possible link between the fact of the law's spirit and the imperative force of that spirit over our conduct as lawyers: "The discretionary approach is grounded in the lawyer's professional commitments to legal values."<sup>134</sup>

We thus move from the "is" of the law's existence not to the

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131. See *infra* Part III.

132. See Simon, *Ethical Discretion*, *supra* note 12, at 1090-1119.

133. But cf. Singer, *supra* note 47, at 28 (noting "the weakness of the theory that law is found and not made").

134. Simon, *Ethical Discretion*, *supra* note 12, at 1113.

"ought" of its morally binding force, but to another "is," the fact that the lawyer *is* committed to the values in law. If lawyers in fact are committed to legal values *ab initio*, then what the spirit of the law whispers is not a command, but a reminder. It does not say, "Follow me, because you ought to commit yourself to me," but rather, "Remember: You have committed yourself to legal values."<sup>135</sup> This neatly avoids the question of how the law binds us to itself; it turns out that we have already bound ourselves. Simon simply reminds us of our self-forged fetters.<sup>136</sup>

It is conceivable, however, that a lawyer will not have forged such fetters<sup>137</sup> or, having forged them, will wish to sever them, at least in some cases. Moreover, at least sometimes lawyers will have bound themselves to norms outside the law, irrespective of whether those norms are somehow latent in the law. For the Abolitionists, lawyers as well as laity, slavery was wrong and to be resisted irrespective of what the Constitution said or, by force of arms, could be made to say.<sup>138</sup> For Dr. King, segregation was unacceptable whether or not the overruling of the "separate but equal" doctrine

135. Michael Walzer generalizes this point in *OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP* (1970): "The paradigm form of consent theory is simply, *I have committed myself (consented): I am committed (obligated).*" *Id.* at x.

136. See Simon, *Ethical Discretion*, *supra* note 12, at 1091 (explaining that the public dimension of a lawyer's discretion is "grounded in the lawyer's age-old claim to be an 'officer of the court.'").

137. Compare Fried, *supra* note 2, at 1065-66 (arguing that grounding a lawyer's obligation to obey professional norms on the lawyer's entry into the profession merely pushes the good person as a good lawyer issue back a step) and Benjamin Freedman, *What Really Makes Professional Morality Different: Response to Martin*, 91 *ETHICS* 626 (1981) (commenting on Mike W. Martin, *Rights and the Meta-Ethics of Professional Morality*, 91 *ETHICS* 619 (1981), and arguing the same point as to doctors) with Ellmann, *supra* note 13, at 137, 152-53 (looking to the oath of admission to practice as a possible source of obligation to obey professional rules) and Stier, *supra* note 2, at 591-92 (stronger statement of the same position).

138. ROBERT M. COVER, *JUSTICE ACCUSED* 150-54 (1975). The position of the dominant wing of the Abolitionist movement, the Garrisonians, as to the legality of slavery is eminently clear from the title of the first book in a trilogy on the issue by their leading advocate. See WENDELL PHILLIPS, *THE CONSTITUTION: A PRO-SLAVERY COMPACT* (1844). To be sure, they countenanced, and even encouraged, the work of lawyers on behalf of individual slaves within what they considered an immoral legal system. See COVER, *supra*, at 159. As to the system itself, however, their prescription was not meliorist. They advocated "disobedience, abstention from voting or office holding, and disunion." *Id.* at 151. Against this position, within the Abolitionist movement, were a "handful of relatively unimportant antislavery thinkers" whose "position that slavery, itself, was unconstitutional was so extreme as to appear trivial." *Id.* at 156. Robin West, in discussing the political and economic nature of the Constitution, summarizes the point as follows:

[T]he Constitution is of negative value for those persons whose interests are at odds with the mandates of constitutionalism. Again, to take only the most obvious example, the Constitution was not only of no objective value but was posi-

was a logical or inevitable or legally appropriate evolution of the equal protection clause.<sup>139</sup> And although those who sat-in at lunch counters may have recognized a moral duty to take their lawful punishment when disagreeing with a law, those who ran Underground Railroads did not.<sup>140</sup>

Simon is well aware that, for reasons such as these, his commitment-to-law approach is not a complete answer to the question of why lawyers should be guided by the spirit of the law:

The discretionary approach does not deny that some issues are best understood as involving conflicts between legal and nonlegal moral commitments. In fact, the distinction between legal and nonlegal commitments has some importance in delimiting the sphere of the discretionary approach, since the approach does not address decision-making involving nonlegal commitments. There are currently no generally accepted guidelines for making such distinctions, and I am not prepared to offer any here.<sup>141</sup>

What Simon is prepared to offer, however, is the suggestion that one can make these distinctions for oneself, on the basis of one's answer to fundamental jurisprudential questions. Moreover, he strongly implies that this exercise will leave only a small residuum of genuinely moral questions.<sup>142</sup> I think he is wrong on both scores. To see why, we must look first at how Simon proposes to distinguish between legal and moral questions, and then at whether the distinction he offers really does reduce the scope of necessary moral decisionmaking.

According to Simon, if you are a "natural law lawyer" of the Lon Fuller school, the relationship between moral and legal matters is fairly straightforward.<sup>143</sup> You will understand the law itself to in-

tively lethal to slaves, escaped slaves, and freed slaves up to the passage of the Civil War Amendments.

West, *supra* note 81, at 1481; see also Anthony D'Amato & Edward J. Eberle, *Three Models of Legal Ethics*, 27 ST. LOUIS U. L.J. 761, 795-98 (1983) (discussing a lawyer's violation of the Fugitive Slave laws as justified by moral rather than legal considerations).

139. *But cf.* Luban, *Difference Made Legal*, *supra* note 71, at 2197-99, 2206 (discussing the tension between Dr. King's "higher law" and antinomian arguments against segregation).

140. These are, of course, tendentious examples. I am trying to show that some of our shared, and most revered, cultural heroes have taken a more open attitude toward the law than Simon, at least at the margins. In appealing to these shared values, I am not lapsing into interpretivism, as will become clear when I turn explicitly to my methodology in Part IV.

141. Simon, *Ethical Discretion*, *supra* note 12, at 1114.

142. *See id.* at 1090-1119.

143. *See id.* at 1115.

corporate moral values. To qualify as a law, a pronouncement must not only have an impeccable official pedigree; it must also meet certain threshold requirements of substantive moral content. If it does not cross that threshold, then it simply is not a law, and you show respect for law writ larger not by honoring the pronouncement, but by disavowing it.<sup>144</sup>

If, on the other hand, you are a positivist who "regards the decisions of authoritative institutions as conclusive" of the status of official pronouncements as law, the relationship between law and morality is more complex.<sup>145</sup> You must then decide, according to Simon, "the scope of [your] own authority within the scheme of legal institutions."<sup>146</sup> In particular, you must determine whether within the law your lawyerly role confers "nullifying powers of the sort commonly imputed to the roles of prosecutor, jury, and judge, and—less commonly—private citizen (to the extent that civil disobedience is justified in terms of, rather than in opposition to, legal values)."<sup>147</sup> Simon offers several examples to show that, at least sometimes, the law itself does—or should—give lawyers such nullifying authority.<sup>148</sup>

Even if we agree with Simon here, we have not gotten very far. For the positivists among us, there remains the question of what to do when legal nullification does not cover the case in which we feel morally compelled to dissent. What if the law's position is insistence on obedience? Simon himself admits that the option of nullification is less commonly afforded private citizens than judges, jurors, and prosecutors,<sup>149</sup> and he offers no evidence that the law is any more generous in this regard when the private citizen is a lawyer, though he seems to think that it should be.<sup>150</sup> And even for those who are "natural law lawyers," the notion that the law has an inherent moral dimension only says why we should dishonor "failed" laws. It does not show why we should be committed to laws that pass the minimum content test but still strike us as more or less ill-

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144. *Id.* One need not, of course, be a natural law lawyer of the Lon Fuller School to invoke moral principles as a check on the law. Robin West, for example, argues that objective ethics can be an effective check on arbitrary power. See West, *supra* note 81, at 1483-87.

145. Simon, *Ethical Discretion*, *supra* note 12, at 1116.

146. *Id.*

147. *Id.* (footnote omitted).

148. See *id.* at 1116-18.

149. See *id.* at 1116; see also *id.* at 1117 n.76 (noting that the criminal defense of justification is limited to violations of statutes that do not specifically exclude the justification proffered).

150. See *id.* at 1116.

considered or awful.<sup>151</sup>

In addition to arguing that the number of instances in which the spirit of the law and the dictates of morality conflict is small, Simon makes the stronger claim that the proper aim of the individual lawyer and the aim of the law itself actually converge in a set of common norms, justice and legality. As Simon puts it, "the discretionary approach requires that the lawyer make her best effort to achieve the most [legally] appropriate resolution in each case."<sup>152</sup> To see why this convergence is to occur, we must examine what Simon means by the norms of justice and legality. This, in turn, will take us back to our original question: How do these public norms become binding on the individual?

In a subsection entitled "What Justice?" Simon anticipates the charge that his use of terms like "justice," "merits," "fair," and "appropriate" begs a critical question—whether these normative terms have any objectively ascertainable content and are not, as some would object, simply "subjective and arbitrary."<sup>153</sup> Simon begins by pointing out that this skeptical view is at odds with "the most basic premises of the understanding of the legal system held by most lawyers," according to which "our legal system depends on the possibility of grounded judgments about legality and justice."<sup>154</sup> But this can only be the prologue to the answer, not the answer itself. To say that skepticism is at odds with an assumption of the prevailing view is hardly to show that that assumption is sustainable and that skepticism is, accordingly, wrong. To think otherwise is to beg the question.

In what, then, does the prevailing view ground judgments about legality and justice? Here we are invited to take the interpretive turn:

In the dominant understanding, judgments about legality and justice are grounded in the norms and practices of the surrounding legal culture. These norms and practices are objective and systematic in the sense that they have observable regularity and are mutually meaningful to

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151. See, e.g., *id.* at 1140-43 (objecting to the present rules that aggressively protect lawyer-client confidentiality); *id.* at 1118 (objecting to the Model Rules' categorical prohibition of lawyers introducing what they know to be perjured testimony into evidence).

152. *Id.* at 1096. The word "legally" is critical here, and is no doubt what Simon has in mind. In the quoted sentence he is explicitly comparing the discretionary approach to two other approaches, both of which permit or require the lawyer to act in a way that admittedly "frustrates the most legally appropriate resolution of the matter." *Id.*

153. *Id.* at 1119-20.

154. *Id.* at 1120.

those who refer to them and engage in them.<sup>155</sup>

This may be true, but there is still a critical gap, something very like Hume's gap between the "is" and the "ought."<sup>156</sup> Even if the law is clear and "objective" in its pronouncements, even if others are in general—perhaps unanimous—accord that those pronouncements advance a constellation of values accepted as "just" in "the surrounding legal culture," there still remains a fundamental question: whether you as an individual should—morally should—adopt those values, so ordered, as your own. Both the law and "correct folk spirit" may tell you that Jews should live in ghettos, or that Blacks should sit in the backs of busses, or that a woman's place is in the home. It still makes sense to ask, "Is it right?" or "Is it consistent with the values to which I am fundamentally committed?"<sup>157</sup>

Because these fundamental questions remain, moral issues cannot be merely a residuum for you as a lawyer. Before you can confine your moral judgment to cases in which the law departs from the prevailing notion of justice, as Simon suggests, you must first answer in the affirmative an anterior question, whether you are morally committed to that notion of justice. Simon implies either that there is no such question, or that you must answer it in the affirmative. I maintain that you must answer it, even if by default, and that an affirmative answer is not the only alternative. You can, of course, simply assume that you are to be committed to the law where it promotes the prevailing conception of justice, and leave to one side the harder cases in which law departs from that kind of justice. But if you do, you will not have avoided the anterior question; you will merely have answered it in a particular way, and in a way that is not the only way.

I shall turn shortly to an obvious retort, namely, that "right folk spirit," rightly understood, never called for any such atrocities as anti-Semitism or racism or sexism. First, though, I want to clarify

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155. *Id.*

156. See HUME, *supra* note 86, at 469 (pointing out the need to explain the "inconceivable" relation between the propositions of is and ought).

157. As these alternative formulations of the question imply, fidelity to the prevailing spirit of the law can be challenged from a realist as well as from a skeptical perspective. The realist would ask the former question in the text; the skeptic, the latter. See Anthony D'Amato, *Lon Fuller and Substantive Natural Law*, 26 AM. J. JURIS. 202, 214-16 (1981) (applying Lon Fuller's natural law approach to fugitive slave laws). As we have seen, however, the realist challenge is the less fundamental of the two. It would be that the law has itself departed from binding public norms. In contrast, the skeptic challenges the very existence of such norms, and hence the possibility of grounding any act of coercion in them.

with two examples the distinction between Simon's collectively defined justice and an individual's moral position. In these examples the position of right folk spirit is both less objectionable and more readily identifiable, and a morally grounded departure from it is easy to demonstrate. The first example is one of Simon's own, and a favorite jurisprudential jawbreaker, the case of *Riggs v. Palmer*.<sup>158</sup> The issue was whether a murderer could be legally barred from inheriting from his victim in the face of an intestacy statute that provided no specific preclusion.<sup>159</sup> The dissent read the statute literally, to uphold the ill-gotten inheritance;<sup>160</sup> the majority imported from elsewhere in the law an implicit limit on profiting from one's own wrong, at least in so unseemly a fashion.<sup>161</sup> Simon's view, and the orthodox rule-of-law position, is that the majority approach was not only wise, but legally principled and objectively correct as a matter of law. Indeed, he holds the *Riggs* case up as a paradigm of discretionary, flexible, spirit-of-the-law decisionmaking.<sup>162</sup>

No doubt a strong case can be made for the view that the *Riggs* case was properly decided according to law, and, in addition, for the wisdom and justice of a legal system under which the wealthy pass their property on to whomever they like, for as long as they like.<sup>163</sup> The point to note is that, though one might concede that this sort of thing is both "just" and "legal" in the sense of being "grounded in the norms and practices of the surrounding legal culture,"<sup>164</sup> you or I might still quite plausibly maintain that it is wrong. By "wrong" we might have reference to Christian charity or Nietzschean *Übermenschlichkeit*, to Marxist dialectic or an ascetic (perhaps even aesthetic) revulsion at the antics of the idle rich.

So, when a close friend asked me how I could have spent a significant part of my life helping the phenomenally wealthy reduce their federal transfer tax liability, I knew he was talking about justice, but by a quite different standard from that which Simon in-

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158. 22 N.E. 188 (N.Y. 1889). Cardozo, Dworkin, and Hart and Sacks have all had a go at it. See Simon, *Ethical Discretion*, *supra* note 12, at 1121 n.85.

159. *Riggs*, 22 N.E. at 189.

160. See *id.* at 191-92.

161. See *id.* at 189.

162. See Simon, *Ethical Discretion*, *supra* note 12, at 1121-22.

163. Compare Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 693-94 (1986) (arguing for the abolition of the traditional rule against perpetuities as an unnecessary restraint on the power of alienation) with LEWIS M. SIMES, *PUBLIC POLICY AND THE DEAD HAND* (1955) and ADAM J. HIRSCH & WILLIAM K.S. WANG, *A QUALITATIVE THEORY OF THE DEAD HAND* (forthcoming) (defending the rule against perpetuities on efficiency and other policy grounds).

164. Simon, *Ethical Discretion*, *supra* note 12, at 1120.



vokes.<sup>165</sup> Whether or not I agreed with his indictment, I could hardly have dismissed it to his satisfaction on the grounds that I was committed to values firmly ensconced in the law, the "dominant understanding" of justice, or both.

Disagreement with the spirit of the law need not be so thorough-going, however, as we can see by looking at another wealth transfer case, this time hypothetical. Alan Goldman presents a case in which a lawyer is asked to draft a will for a wealthy widow who wants to disinherit her son for marrying outside the family's faith.<sup>166</sup> He uses this example to contrast the responses of various systems of lawyers' ethics, the old role morality and three alternatives.

The answer of the old role morality is easy—you need have no moral qualms about drafting the widow's will the way she wants it. Whether her manipulateness is misplaced or even malevolent is of no concern to you. According to Goldman's first alternative to the old role morality, "the lawyer could be required to advance his client's cause only through means compatible with settlement of the conflict on the legal merits."<sup>167</sup> On a sufficiently broad reading of "legal merits," this alternative would cover Simon's discretionary model. On first face, this approach would seem to agree with the old role morality in this case; the widow is surely within her legal rights in disinheriting whomever she likes—or dislikes.<sup>168</sup> Simon might argue, under an analysis like that of the majority in *Riggs*, that the lawyer should frame the issue more broadly, and should look, for example, to the law's interest in family stability and harmony.

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165. In fairness to Simon, I must concede that under his own "relative merit" idea, *see infra* text accompanying notes 173-175, my prior life might also come in for censure, but it would be censure of a different sort. Under the relative merits analysis, I could arguably have allocated my time to clients whose needs for legal counsel were identifiably more pressing in terms internal to the law itself. My friend's point was more radical—even if all other needs for legal assistance had been met, I would have been wrong to lend my assistance to these morally questionable transactions.

166. *See* GOLDMAN, *supra* note 11, at 104. Like the *Riggs* case, this example, with slight permutations, is a perennial favorite. *See, e.g.,* SHAFFER, *supra* note 2, at 3 (disinheriting husband and children so as to give all of the estate to the Christian Anti-Communist Crusade); Pepper, *supra* note 2, at 614 (disinheriting children should they marry outside the faith); Wasserstrom, *supra* note 18, at 7, 10 (disinheriting children who object to Vietnam War); Schneyer, *supra* note 33, at 1562-63 (disinheriting son for resisting the draft); *see also* Stier, *supra* note 2, at 564 (discussing Schneyer's example).

167. GOLDMAN, *supra* note 11, at 137.

168. Goldman's "legal merits" alternative will generally produce a different result from the old role morality only when the latter would involve procedural maneuvering to achieve a substantive result inconsistent with the letter of the positive law by, for example, imposing unnecessary costs or delays on opponents. *Id.* at 137-38. Because, as we have seen, Simon defines legal merits more broadly, his approach will part ways with the old role morality more often.

But even if there were no such other constraints available within the law, there might be moral reasons for a conscientious lawyer to reject the case.

For one thing, the lawyer might, like my friend, think that the laws permitting freedom of testation are immoral.<sup>169</sup> Still in disagreement with the legally permissible outcome, but on a much narrower front, the lawyer might think that, even if freedom of testation is generally good, this particular exercise is bad<sup>170</sup> on account of the kind of control the mother is trying to exercise or the likely bad effects it will have on either the child or the family as a whole.<sup>171</sup> The conscientious lawyer with either conviction would feel disinclined to write the will even if nothing in the spirit or letter of the law forbade it.

Under a corollary of Simon's discretionary approach, however, Simon could respond that, on these facts, the lawyer considering the case would never reach this conflict between the spirit of the law, or the legal merits broadly defined, and individual moral convictions. Under the central premise of Simon's discretionary approach, lawyers pursue justice, as embodied in the spirit of the law, in their exercise of discretion.<sup>172</sup> So far, I have focused on only one aspect of that discretion, deciding whether the outcome the client seeks is consistent with the legal merits of the matter. Simon has, however, identified another, distributional, aspect of discretion, "an assessment of the relative merits of the client's goals and claims and claims of others whom the lawyer might serve."<sup>173</sup> The first aspect of discretion acknowledges the fact that some claims are meritorious

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169. This approach corresponds, in principle at least, to Goldman's second alternative to full advocacy, under which the lawyer is required "to aid his clients in achieving all and only that to which they have moral rights." *Id.* at 138. In applying that principle to this case, however, Goldman reaches a different result because he assumes that the widow has a moral as well as legal right to dispose of her property as she wishes. *See id.* at 148.

170. This approach corresponds to Goldman's third alternative to full advocacy, under which the lawyer should "aid clients only in doing what is moral to do." *Id.* at 138. As applied in this example, the difference between Goldman's second and third approaches seems analogous to the distinction in moral philosophy between rule and act consequentialism. Under the second, or rule consequentialist alternative, the lawyer drafts the will because, in the usual situation, free testation produces the best result; under the third, or act consequentialist alternative, the lawyer declines to draft the will, because in this particular case disinheritance is a bad result.

171. *See* Shaffer, *supra* note 19, at 965-68 (arguing for the representation of organic groups like families in addition to, and sometimes as more fundamental than, their individual constituents).

172. *See* Simon, *Ethical Discretion*, *supra* note 12, at 1091.

173. *Id.*

in an absolute sense, as measured directly against the standard of the law itself; the second aspect recognizes that, even among legally meritorious claims, some are more worthy of advancement than others. With the second aspect as with the first, the assessment of merit can be made on the basis of standards internal to the law. The spirit of the law offers us guidance, according to Simon, not only as to which position on a particular issue should prevail if pressed, but which kinds of issues are relatively more important, more worthy of resolution by legal process.<sup>174</sup>

Applying this second aspect of the "pursue justice" model to the case of Goldman's widow, Simon might argue that this simply is not a case worthy of a lawyer's attention. A lawyer should decline to help Goldman's widow not because intra-family wealth transfers are inherently evil, or because this one is particularly ill-motivated, but because there is a more pressing need for legal talent elsewhere. In response, perhaps we could, with a bit of tugging and hauling, squeeze Goldman's widow past the criteria Simon identifies in the law itself for assessing the proper distribution of legal services;<sup>175</sup> perhaps we could not. If we could, the moralist's objection remains: it is wrong to lend assistance to such morally questionable transactions. But if we could not meet Simon's criteria of relative merit, we are simply back to our original question: even if criteria internal to the legal system indicate that a particular claim is more or less worthy of a lawyer's scarce time, why should we as individuals feel bound by that? In this way the relative merits aspect of Simon's "pursue justice" model raises the same issue as the internal merits analysis: why should an individual lawyer be committed to a policy even if it is implicit in the law?

The distinction that arises in this example between Simon's spirit of the law and possible individual moral positions is just one instance of a larger problem in Simon's approach. That problem is a critical ambiguity in the concept of legitimacy. Simon argues that

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174. *See id.* at 1092-93.

175. The primary factors are, according to Simon, "the extent to which the claims and goals are grounded in the law, the importance of the interests involved, and the extent to which the representation would contribute to the equalization of access to the legal system." *Id.* at 1093. We can improve the odds for Goldman's widow under the last of these criteria by hypothetically impoverishing her. If you believe in the declining marginal utility of money, this should also help us under the second of Simon's criteria. And if the second is concerned more with the societal importance of the right in question than with its significance in the particular case, Goldman's widow has the advantage of raising a property right, a right protected in two places in the Bill of Rights. That, in turn, should leave no doubt under the first criterion: both property rights generally, and the right of free testation in particular, are well grounded in law.

those who disagree with authoritative judgments about legality "are often willing to accept a particular decision as legitimate, even when they regard it as mistaken, in part because they recognize it as a good faith attempt to apply the norms and practices of the culture."<sup>176</sup> In the parlance of political science, legitimacy is a distinctly amphibious concept; it does some of its work in the descriptive realm and some in the normative. In the former realm, where it now sees the most action, it means that which is accepted as authoritative.<sup>177</sup> It is in this realm, for example, where it can be accurately said that power tends to legitimate itself. Those who have political power, however they came to have it, tend over time to become accepted as the legitimate authorities, both by their subjects and by the corresponding heads of foreign regimes.<sup>178</sup> As E.S. Morgan put it, "If you can steal an empire you are not a thief, but an emperor."<sup>179</sup> It is no objection to this notion of legitimacy that the acceptance sometimes comes after the fairly aggressive suppression of opposition.

In the normative realm, "legitimate" denotes what *ought* to be accepted as authoritative, what is morally acceptable, not just actually accepted.<sup>180</sup> To be sure, one can elide the two realms with the premise that what the culture accepts is itself the defining characteristic of what is normatively acceptable. Alternatively, one logically could be committed, as a matter of personal moral choice, to the values in law and public notions of justice. But this would just be a special case of moral commitment generally, and so stated it gives no reason for that commitment as opposed to some other set of values. One need not elevate the "is" to the status of the "ought," either by general definition or by personal conviction. You, as a member of the political order, can always ask whether what is accepted as legitimate by the prevailing culture ought to be so accepted, under standards either external or internal to yourself.<sup>181</sup>

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176. *Id.* at 1120.

177. See Felix E. Oppenheim, *The Language of Political Inquiry: The Problems of Clarification*, in 1 HANDBOOK OF POLITICAL SCIENCE: POLITICAL SCIENCE, SCOPE AND THEORY 283, 320-23 (Fred I. Greenstein & Nelson W. Polsby eds., 1975).

178. See W. Michael Reisman, *Law from the Policy Perspective*, in MYRES S. MCDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW ESSAYS 9 (1981).

179. EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 10 (1975).

180. Oppenheim, *supra* note 177, at 322.

181. This understanding of legitimacy also answers Stick's argument that what is objectively legal may not be legitimate. This is true because the standards of objectivity in law are set by lawyers and judges, whereas "the group who sets the standards for political legitimacy generally" are "the set of citizens with some political power." John Stick,

This point is important, for in both his exposition of the discretionary model of lawyering and in his other writings, Simon is clearly not a defender of the legal, economic, or social status quo.<sup>182</sup> The question, then, is how Simon's commitment to reform can be reconciled with his insistence on the lawyer's commitment to legal values. One way would be to object that I view the "norms and practices of the surrounding legal culture" too narrowly, or too statically—too narrowly, in that the prevailing culture admits of more demanding views of justice; and too statically, in that the prevailing culture can be expected to mature, to evolve toward ideals which exist in it now only in embryonic form. Ghettos, Jim Crow, and the Stepford wife may have had the full support of law, but not of "right folk spirit," rightly understood.

But the rub, of course, lies in giving content to "rightly understood." The broader and more dynamic one's definition of the prevailing culture, the more difficult it is to make predictable extrapolations from it, the kind of predictable extrapolations that are necessary if legality and justice are to have the objective, ascertainable contents Simon requires. At the margin, inclusiveness in the definition of legal culture becomes dangerously circular; in some sense, all future legal culture predictably will be built from the materials of present legal culture. The appropriate historical image, however, would not be the incremental construction of the Gothic cathedrals for the greater glory of God, but the clandestine dismantling of the pyramids for incorporation in more mundane projects elsewhere. Of course the subverters of the ancien régime will often invoke some of the principles or institutions of that regime to undermine it now and to demolish it later. The English Puritans appealed to the same Bible for the justice of their regicide as the House of Stuart did for the divine right of kings.<sup>183</sup> The French

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*Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 371 (1986). But it still leaves you to wonder how the normative decisions of the latter group are binding upon you as an individual.

182. Any doubts on that score can be resolved by reading William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984), in which he favors a form of law practice that would move lawyers, clients, and society at large toward the Critical Legal Studies movement's desideratum, "nonhierarchical community."

183. Some of the Puritans urged James to commission the translation that now bears his name. See 3 THE CAMBRIDGE HISTORY OF THE BIBLE 164 (1963). Others continued to prefer the English translation made in Geneva under Calvin's auspices. See *id.* at 361, 454; see also ROLAND H. BAINTON, THE REFORMATION OF THE SIXTEENTH CENTURY 238-42 (1952) (The French Calvinists relied on covenantal theology for resistance to repressive Catholic monarchs; the Jesuits made parallel appeals against heretical kings when the Protestants were in power.).

Revolution began, if such an upheaval can be said to have a clear beginning, with dissidents' insistence on a meeting of that moribund medieval relic, the Estates General.<sup>184</sup>

Gramsci provides an insightful account of how this can be understood not merely as crass political posturing, but as a conscientious appeal by both conservatives and radicals to the roots of the dominant culture.<sup>185</sup> Every ruling class, according to this theory, must present itself as a universal class, as asserting not only its own interests, but also those of the commonweal. In so doing, the dominant class gains wide legitimacy (of the descriptive sort), but at the cost of espousing principles not entirely consistent with their particular interests. Radical critics insist that these espoused principles be given their fully universal reading.<sup>186</sup> In so doing they set in motion what Gramsci called

"a process of differentiation and change in the relative weight that the elements of the old ideologies used to possess. What was previously secondary and subordinate [in my examples, the individual interpretation of the Bible and the political role of the Third Estate] . . . is now taken to be primary and becomes the nucleus of a new ideological and theoretical complex."<sup>187</sup>

To acknowledge the plausibility of this explanation is not to deny that a particular historical course may be legal or just according to prevailing standards. Quite the contrary; it is to suggest that interpreting the prevailing culture too dynamically or too inclusively makes it virtually impossible to show that any particular course of evolution is any more consistent with prevailing norms than numerous other, mutually inconsistent and exclusive, alternatives.<sup>188</sup> It

184. As Simon points out, even the eventual execution of the king was explained in terms of the legal practices of the ancien régime. See Simon, *supra* note 182, at 496.

185. WALZER, *supra* note 78, at 41-42 (discussing SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 195 (Quinton Hoare & Geoffrey N. Smith eds. & trans., 1971)).

186. *Id.* at 40-41.

187. *Id.* at 42 (quoting SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI, *supra* note 185, at 195). Simon himself is quite aware of, and even sympathetic with, this process. See Simon, *supra* note 182, at 496-501.

188. As Simon notes, in the civil rights movement, "both the civil rights activists and their antagonists understood their efforts as vindicating an established order." Simon, *supra* note 182, at 500. Their appeal, accordingly, had to be to what they thought that order should become or remain, not a question that could be answered by looking to what it had been, and not a question that could be answered without a choice of deep personal commitments. See Posner, *supra* note 47, at 887 ("[A] concern for history and context; . . . an appreciation of the complexity of life' [—] give me these leeways and I will

may be asking too much that plotting one's course according to the constellation of legal values be as precise a science as astronomy. But one can fairly complain of being told to make do with the ambiguities of astrology. It is one thing to be denied a sextant and told that we are hopelessly adrift; it is another to be offered a horoscope, with the suggestion that it will help.

Suppose, however, that you were to discover that the values you espouse, and in terms of which you set your fundamental moral commitments, are also embodied to a greater or lesser extent in the law. This latter factor nevertheless may well be distinctly subordinate to your commitment to the values on other grounds. Suppose the law further evolves in the direction of your values. Even if it could be said that the moral positions I now espouse will someday be more fully realized in the law or more widely understood as the proper interpretation of the dominant culture, the fact remains that I do not now espouse them for that reason. This is even clearer if you imagine the law evolving in another direction, away from those values. Quite plausibly, you may hold them no less dearly. Indeed, you may hold them more dearly, as their survival will depend all the more on your individual efforts, and the efforts of other dissenters. So, a century before the Bastille, when Louis XIV decreed "*un roi, une loi, une foi*,"<sup>189</sup> the Huguenots left France to join, or create, cultures more to their liking;<sup>190</sup> so, despairing of the Stuarts and their claims of royal prerogative and divine right, the more adventuresome Puritans left Old England to build a New.<sup>191</sup> And so the Abolitionists redoubled, rather than slackened, their efforts after *Dred Scott*,<sup>192</sup> even as their progeny formed the NAACP,<sup>193</sup> in 1909, in the wake of *Plessy v. Ferguson*.<sup>194</sup>

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move the world; there is no decision that cannot be rationalized with the aid of such open-ended concepts . . . ." (citation omitted)).

189. RICHARD S. DUNN, *THE AGE OF RELIGIOUS WARS, 1559-1689*, at 160 (1970).

190. G.A. ROTHROCK, *THE HUGUENOTS: A BIOGRAPHY OF A MINORITY* 175 (1979).

191. For a general history of the Puritan Revolution, see DUNN, *supra* note 189, at 139-53. When the Stuarts returned from their travels, after the dismantling of the Cromwellian regime, and the prevailing culture in Old England took a less laudatory view of regicide, several of the judges who had signed Charles I's death warrant took refuge in New England. See 2 CHARLES M. ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY* 184-85 (1964); MARY JEANNE ANDERSON JONES, *CONGREGATIONAL COMMONWEALTH* 167-68 (1968). Their new compatriots welcomed them, protected them from the new state of law and justice at home, and named the New Haven, Connecticut thoroughfares Dixwell and Whalley in their honor.

192. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

193. COVER, *supra* note 138, at 159-62 (discussing the relations of abolitionists with lawyers representing fugitive slaves).

194. 163 U.S. 537 (1896).

Dworkin's account of civil disobedience, on which Simon draws for his notion of commitment to law,<sup>195</sup> seriously underemphasizes this distinction between moral and legal reasons for espousing or resisting aspects of the positive law. Dworkin plausibly maintains that those who objected to the Vietnam draft, like the Jehovah's Witnesses who in earlier wars objected to mandatory pledges of allegiance by school children,<sup>196</sup> could have based their resistance on good-faith and legally colorable beliefs that the laws in question were unconstitutional, even after the United State Supreme Court had declared otherwise.<sup>197</sup> As Dworkin notes, however,

[t]his description may fit some of those who disobey the draft laws out of conscience, but it does not fit most of them. Most of the dissenters are not lawyers or political philosophers; they believe that the laws on the books are immoral, and inconsistent with their country's legal ideals, but they have not considered the question of whether they may be invalid as well.<sup>198</sup>

Dworkin attributes this divergence between the dissidents' subjective motives for disobeying the law and the available argument against the law's validity to their lack of legal sophistication.<sup>199</sup> This divergence is, however, suggestive of something more dramatic. We can safely surmise that many, perhaps most, of the dissenters would not have been more respectful of the draft law had they been convinced that it was valid, or even that it was consistent with their country's legal ideals; it would have been enough for them that, by their lights, it was wrong.

This coincidence of moral with legal grounds for disobedience may be an important consideration for the law's enforcers. As Dworkin suggests, they may well feel compelled to deal more leniently with violators if the law violated is of questionable validity and if the violators invoke that questionable validity as their motive. The legal system in general is less likely to be undermined, and may in fact be strengthened, by the challenge of such violations.<sup>200</sup> But to establish that those who adopt the values embodied in law have

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195. See Simon, *Ethical Discretion*, *supra* note 12, at 1116 n.73.

196. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 213 (1977); see *West Va. State Bd. of Educ. v. Barnett*, 319 U.S. 624 (1943) (overruling *Minersville Sch. Dist. v. Gubitis*, 310 U.S. 586 (1940)).

197. DWORKIN, *supra* note 196, at 214-15.

198. *Id.* at 215.

199. See *id.*

200. *Id.* at 206-22; see also KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 276-83 (1987).



good legal reasons, reasons internal to the law they serve, to deal leniently with those who depart from the law in the name of values the law recognizes is not to establish that the law is justified in coercing those who reject the law's ordering of values. Nor does it establish that citizens are morally bound to obey a law they think morally wrong. Establishing that will require an excursion into ordinary morality, an excursion Simon declines to make.<sup>201</sup>

If I am right, I have only shown that representation of clients within the spirit rather than the letter of the law will not alleviate ethical problems to the extent Simon believes. It would still be possible to ask whether the spirit of the law is to be followed in every case and to ask in particular cases the more pointed question of whether a lawyer should violate the moral rights of third parties in advancing a client's claims within the spirit of the law. But to show that obeying the spirit of the law does not necessarily remove moral difficulties is not to show that it cannot remove such difficulties. Perhaps ordinary morality itself supports Simon's discretionary model of lawyering.

All I have done, then, is to press Simon back to ordinary morality. To answer the questions that I insist are still open, he need only show how the commitment to legal values, on which his new role morality rests, is reconcilable with ordinary morality. We must, then, see why he is at pains to base his alternative to the old role morality on legal rather than moral grounds.

On that point he is quite explicit:

Although critics of conventional legal ethics discourse [the old role morality] often adopt the law versus morality characterization, its strongest influence is to bias discussion in favor of conventional, libertarian, responses. Typically the conventional response is portrayed as the "legal" one; the unconventional response is portrayed as a "moral" alternative. This rhetoric connotes that the "legal" option is objective and internal to the professional role, whereas the "moral" alternative is subjective and peripheral. Even when the rhetoric expresses respect for the "moral" alternative, it implies that the lawyer who adopts it is on her own and vulnerable both intellectually and practically. The usual effect is to make it psychologically harder for lawyers and law students to argue for the "moral" alternative.<sup>202</sup>

The validity of this assessment depends, however, on its underlying

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201. See Simon, *Ethical Discretion*, *supra* note 12, at 1113-14.

202. *Id.* at 1114.

metaethical assumptions. As we have seen, morality of the realist and interpretivist modes purports to be every bit as objective as Simon's notions of legality and justice, even if it is not reducible to either without remainder. Indeed, morality of the interpretivist mode rests on precisely the kinds of communal consensus upon which Simon rests his notions of legality and justice. Thus neither interpretivists nor realists should in principle (or, to use Simon's word, intellectually) be at a disadvantage on the grounds that their position is more subjective.<sup>203</sup> Nor should they be particularly vulnerable to the charge that their moral norms are external to the law. If they are "natural law lawyers," moral norms are part of their vision of the law. Even if they are not natural law lawyers, their moral principles can still be said to derive from the same set of values as those of law itself<sup>204</sup>—communal values for interpretivists, cosmic values for realists. The very question with which we began—what to do when moral and legal values appear to conflict—will of course be left unresolved. But it is at least plausible that the ordinary moral principles will trump the legal or that the two can be reconciled, perhaps by subsuming one under the other.

It is also unclear why the opponent of the old role morality who is a moral interpretivist or realist will be at any practical disadvantage. Moral principles writ in the heavens or graven on the hearts of our fellows may sometimes be difficult to decipher, but there is no reason to think that the spirit of the law residing in the same places is any more readily accessible. Simon gives us no further reason for thinking that the moral position should be psychologically harder to argue; in the quoted passage, he posits psychological difficulty as the effect of the moral lawyer's alleged intellectual and practical vulnerability, not as an independent impediment.<sup>205</sup> If its causes can be removed along the lines I suggest, presumably the psychological hardship would disappear.

The story is not the same, however, for skepticism. By definition, skepticism accepts no objective set of moral standards external to the individual will.<sup>206</sup> But we must be careful in conceding that this makes it "intellectually and practically" more difficult to argue against the old role morality on moral grounds. On the one hand, skepticism's removal of an objective basis for morality certainly makes it difficult to account for why every lawyer is bound to obey

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203. *Id.*

204. See *supra* note 81 (arguing that not all legal positivists are moral skeptics).

205. See *supra* text accompanying note 202.

206. MACKIE, *supra* note 74, at 15-17.

the spirit, or even the letter, of the law, and why coercion of those who do not obey is justified. Moreover, skepticism explicitly leaves those who adopt it "on [their] own," at least in terms of the foundations of their moral commitments.<sup>207</sup>

On the other hand, however, skepticism presents no intellectual problem for the lawyer who wants to give an account of a personal commitment to values inherent in the law, as opposed to an argument that those values command a universal pledge of allegiance. Skepticism leaves open the possibility of fideism, and Simon's system can rest comfortably on fideist foundations. Recall that, on the fideist principles outlined in the last section, all the grounding that one needs for one's ethical commitments (and perhaps all the grounding that one can ever have) is that commitment itself. Thus, lawyers who are committed to implementing the spirit of the law in their representation of clients need look no further. Indeed, on the skeptical premises that underlie fideism, looking further would be futile.

Doubts raised by moral skepticism only become a problem when Simon tries to make his system universal, binding on all lawyers, either as a matter of public norms or as legally enforceable standards of lawyerly conduct.<sup>208</sup> For that, he needs the kind of grounding in common moral principles that Luban tries to provide. Luban's brand of the new role morality is an effort to do precisely what Simon eschews: link law, and more particularly lawyers' obligation to law, directly to ordinary morality.

*B. Lawyers' Role Norms Grounded in Ordinary Morality: Luban's  
Fourfold Root of Sufficient Reason*

Summarizing and reaffirming the position he took in *Lawyers and Justice*, Luban has said that

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207. Whether we are alone in any other sense, I will take up later. See *infra* Subpart IV.B.

208. That Simon does see his system as universally binding in this sense is clear from his opening paragraph: "Lawyers should have ethical discretion to refuse to assist in the pursuit of legally permissible courses of action and in the assertion of potentially enforceable legal claims. This discretion involves not a personal privilege of arbitrary decision, but a professional duty of reflective judgment." Simon, *Ethical Discretion*, *supra* note 12, at 1083. Later in his introduction, Simon adds that, "[t]hroughout most of the discussion I do not distinguish between ethical analysis relevant to a regulatory body promulgating rules of professional conduct and analysis relevant to an individual lawyer operating within the limits of promulgated rules. The argument is designed for both contexts." *Id.* at 1084. This analysis could hardly be relevant to the promulgation of rules Simon believes lawyers are morally bound to obey, unless he thought the analysis had universal validity.

cooperative schemes create moral obligations when

- (1) they create benefits;
- (2) the benefits are general: they accrue . . . to the whole community;
- (3) widespread participation in the scheme is necessary for it to succeed;
- (4) the scheme actually elicits widespread participation; and
- (5) the scheme is a reasonable or important one.<sup>209</sup>

There are several preliminary points to note about Luban's position on legal obligation. The first is that he does not quibble over whether one's obligation is to the law *per se*, or to the law as the embodiment of beneficial cooperative schemes;<sup>210</sup> for Luban, it is the latter. Law is a necessary means for the coordination of large-scale cooperative schemes, and this is what gives law its morally binding force.<sup>211</sup>

The second point to note about Luban's view of legal obligation is its relation to legal ethics. At the broadest level of generality, Luban's entire system of legal ethics, as articulated in his fourfold root analysis, is meant to operate as a collectively beneficial scheme. Recall from the brief description of that system in Part I,<sup>212</sup> in connection with the *Lake Pleasant* case, that the role of lawyer is designed to implement important societal goals. We must scrutinize not only the lawyers' role in gross, but also the particular role obligations it embodies and the particular role acts those obligations dictate. The touchstone, in the particular as in the general, is fidelity to beneficial cooperative schemes.

The question on which I want to focus is why the touchstone of that judgment is advancement of collectively beneficial schemes, collectively determined—in other words, why a lawyer must advance schemes with a public imprimatur of collective benefit even if the lawyer's own view of the commonweal differs. To demonstrate why this is so, Luban will have to take us to his moral foundations, to

209. Luban, *Mid-Course Corrections*, *supra* note 52, at 454.

210. See Ellmann, *supra* note 13, at 135 n.41 (raising this issue). For a criticism of quibbling on that score, see Mackie's discussion of Raz and Wooley's drawing of essentially the same distinction. J.L. Mackie, *Obligations to Obey the Law*, 67 VA. L. REV. 143, 149-50 (1981).

211. Luban, *Mid-Course Corrections*, *supra* note 52, at 455. Luban argues at considerable length that we should honor collectively beneficial schemes even if they do not have the force of law. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 37-47; Luban, *Mid-Course Corrections*, *supra*, at 458-60.

212. See *supra* Subpart I.B.2.

show us why schemes that purport to confer collective benefits, both in the law at large and in the particular obligations of the lawyerly role, are morally binding on an individual lawyer whose moral judgment differs.

This brings us to the third, and final, preliminary point about Luban's system: its premises are liberal or, more precisely if more clumsily, secular, egalitarian, and humanistic.<sup>213</sup> Humanism is implicit in the first proposition quoted above: it expresses the value judgment that benefits to humans are of fundamental importance. Projects that benefit human beings not only *are* desired, but also are *to be* desired; they are good, in either the absolute sense of the realists, the fideist sense that I have outlined, or the mediating sense of the interpretivists. The humanism of the first statement implies a secularism that Luban makes explicit elsewhere:<sup>214</sup> it is human benefits that count, and it is humans that do the counting, by their own devices and without divine assistance. Human beings are the measurers, as well as the measure, of all things. Finally, egalitarianism is explicit in the second proposition: benefits ought to be dispensed among humans equally, or at least with a strong presumption of equality, because all humans are of equal moral worth.<sup>215</sup> Any inequality must be justified in terms analogous to

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213. To equate liberalism with secular egalitarian humanism is, of course, to define liberalism more broadly than is either customary or suitable for general purposes. This definition will suffice for my purposes, however, if we add another criterion: a belief that the legal system of the United States is generally just. The point of the definition is to capture, in a short-hand phrase, those to whom Luban is primarily addressing himself. Furthermore, Luban explicitly adopts the "generally just" condition in his discussion of legal obligation. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 43, 49. The criterion, though somewhat crude, nicely brackets several groups of secular egalitarian humanists whom Luban is not primarily addressing—traditional Marxists and certain radical feminists, for example—and who could be distinguished from a more generally satisfactory definition of liberalism only at much greater length. The definition I use here also has the advantage of including in the liberal fold libertarians, whose position Luban takes pains to address. See *infra* Subpart III.B.1.

214. Luban notes that "[m]y own point of departure has been neither legal nor religious doctrine but rather secular ethical thought." LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at xxvi. This is not, of course, tantamount to denying the relevance of religion to legal ethics, and Luban himself describes "the role of religious thought in ethical problems of law practice" as "tremendously important." *Id.* Arguing without appeal to God is standard practice among liberal scholars, even among those who are themselves religious. But Luban has clearly taken God out of the lineup, and if the divinity appears as a designated hitter late in the game, it should be fair to remind Luban of the ground rules. See *infra* text accompanying notes 368-370.

215. This third proposition is the only one of the three that Luban tries to prove, and his proof is not particularly persuasive. According to that argument, "moral respect for humanity and human interests" follows from the premise that "we are all equally deserving: we're all human and we all share the same human interests." LUBAN, *LAWYERS AND*

constitutional equal protection analysis.<sup>216</sup>

Although these background assumptions are clear and need not be questioned, the same cannot be said of the scope of the claim as to legal obligation that Luban tries to build within these parameters.<sup>217</sup> There are three basic possibilities that we need to consider. First, and most modestly, he may merely claim to show that, by following the fourfold root—in particular, by adopting and acting upon his deferential attitude toward what purport to be collectively beneficial schemes—one can be both a good lawyer and a good liberal. To accomplish this most modest task, he needs only to show that this position is consistent with a plausible reading and application of liberal principles.

More ambitiously, he might want to show that any or all alternative attitudes to schemes that putatively redound to the general welfare are inconsistent with liberalism, that his is the only way to be liberal, or that at least some ways that permit treating putatively beneficial cooperative schemes differently are illiberal. To establish this position, like the first, he can take liberal premises as given. He can, in effect, assume a fideist attitude toward the first principles of liberalism: I can't prove them, and perhaps they are unprovable,

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JUSTICE, *supra* note 2, at 42-43. Now that is a fine premise, and one to which I myself am deeply committed. But unless that premise is independently proved or grounded on something other than my commitment and his, Luban is still open to the charge he anticipates from those with "aristocratic pretensions": "at the very least it begs the question to assume that [one's fellow humans] are worthy of respect." *Id.* at 42. See Pepita Haezrahi, *The Concept of Man as End-in-Himself*, in IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 292 (Robert P. Wolff ed., Lewis W. Beck trans., 1969) (criticizing as circular the arguments of Kant, Mill, Rousseau, and Sartre for the equal moral dignity of humans). It hardly answers this objection to suggest, as Luban does of Nietzsche and Max Stirner, that "ample grounds exist to deny that their egalitarianism was sane." LUBAN, *supra*, at 43 n.23. To deny that Luban has thus made the case for egalitarianism is not, of course, to assert that anyone has made the case for egalitarianism, or that the assertion of the latter cannot be satisfactorily answered. For a fideist answer, see Part IV.

216. Luban describes how such departures might be justified in *LAWYERS AND JUSTICE*, *supra* note 2, at 43-49, and makes the analogy to equal protection analysis explicit in *Mid-Course Corrections*, *supra* note 52, at 456.

217. I am not the first to note this ambiguity in a traditional liberal political theorist, and Luban is not the first such theorist of whom it has been noted. Philip Soper makes the same point as to Dworkin's theory of legal obligation. See Philip Soper, *Dworkin's Domain*, 100 HARV. L. REV. 1166, 1180 n.40 (1987) (reviewing RONALD DWORKIN, *supra* note 84). More generally, Alasdair MacIntyre finds the tension between intramural and extramural appeals endemic to liberal thought. See ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 328-48 (1988) ("Liberalism Transformed into a Tradition"). Liberals, he argues, are torn between their original claim to transcend tradition with an appeal to universal truth, and their emerging realization that theirs is but one tradition among many. See *id.* at 335-46.

but I can discuss with fellow believers the consequences of our beliefs. Because logical coherence in moral life is one of our shared commitments, they will be compelled to listen and change if my point is well argued.

There is a third, and most ambitious, point that Luban might want to make, and, indeed, sometimes seems to be making. He might want to show that to be a good person at all, one must have his attitude toward what are billed as collectively beneficial schemes. To establish this claim, he cannot take the first principles of liberalism as given; to do so would be to beg fundamental questions. Instead, he must appeal either to moral principles binding on all people, as the realists do, or, in the interpretivist mode, to a set of values or a foundational text to which all parties subscribe, a set or text necessarily more inclusive than those of liberalism.

Luban focuses primarily on the first two, intramural claims, seldom addressing the last, extramural claim directly.<sup>218</sup> But he is pressed back to the extramural claim, I shall argue, when his intramural arguments with fellow liberals fail him and he must look beyond the pale of secular egalitarian humanism to sustain a moral obligation to obey the law. In this Part, I try to trace how this occurs. First, with respect to his ambitious intramural claim, I want to show that the degree of commitment to public norms and putatively beneficial schemes that he demands is not the only position consistent with liberal premises. Then I want to identify the problems that commitment to public norms creates within Luban's own system, threatening even his modest intramural claim that following the fourfold root is one way to be a good liberal and a good lawyer. We will see, finally, why these problems press Luban toward his most ambitious, and ultimately extramural, claims of political legitimacy, and why his arguments for those claims are either inadequate or problematic.

In my assessment, accordingly, Luban makes good on none of his three claims. But "good" here cannot be an absolute; it is always fair to ask "Compared to what?," and I gladly concede that Luban's system is an improvement upon the old role morality. Particularly with respect to Luban's basic claim, the claim that the fourfold root is a workable way of being a good lawyer and a good (liberal) person, my assessment will have to be that Luban's account is less workable than some third alternative. Accordingly, as I critically examine the foundations of Luban's theory of legal ethics, I shall also

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218. See *supra* note 215 for Luban's criticism of Nietzsche's inegalitarianism.

be laying the foundation for my own account, an account that dispenses with Luban's reliance on binding public norms and obligatory deference to putatively beneficial cooperative schemes.

1. *Luban's Ambitious Intramural Claim.*—As Luban notes, most of his argument in *Lawyers and Justice* focused on defending the fifth proposition quoted above ("the scheme is a reasonable or important one") against a more restrictive alternative, which he labels (5'): "the benefits actually are accepted by citizens (either tacitly or implicitly)."<sup>219</sup> This is the position of libertarians, and Luban's argument with them is essentially an intramural dispute among secular egalitarian humanists. Taking libertarians as his primary opponents within the liberal fold, Luban tries to show that no system of legal ethics with an attitude toward the scope of legal obligation different from his own can be built upon liberal foundations. If we try, we will fail in either of two ways: we will either deny our fellow citizens equality or destroy our own integrity. On close examination, however, neither risk materializes.

a. *The Threat to Equality.*—The *Lake Pleasant* case, which we encountered in Part I,<sup>220</sup> is a useful avenue through which to approach this aspect of Luban's position. As Luban himself admits,<sup>221</sup> the departure from the role-required conduct in this case is almost certain to produce more good in terms of ordinary moral considerations than harm to the criminal defense system in terms of which the act is to be justified. But if this is so, then why insist upon adherence to the role in this instance? Why not reveal Garrow's dark secret and relieve the parents' grief?

In response to these questions,<sup>222</sup> Luban explicitly shifts from an act consequentialist to a deontological reading of the fourfold root, thus moving from one hemisphere of substantive moral philos-

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219. Luban, *Mid-Course Corrections*, *supra* note 52, at 454-55. Luban defends against another alternative to proposition (5), which would require that, in order to be binding, collectively beneficial schemes be not just "reasonable or important," but uniquely appropriate, or nearly so. *See id.* at 458-61. We will concern ourselves with that alternative, which Luban attributes to David Wasserman, only to the extent that Luban traces it and the libertarian alternative to a common root, fear of excessive immersion in the collective will. *See id.* at 458-62. I will try at the end of this Part to trace Luban's preference for his version of (5) to just the opposite fear, fear of inadequate attention to the collective. I note his looking behind the premises of his critics in this way as implicit acknowledgment that such an analysis is both fair and useful.

220. *See supra* Subpart I.B.2.

221. *See* Luban, *Mid-Course Corrections*, *supra* note 52, at 426.

222. *See* Wasserman, *supra* note 26, at 398-402 (raising these questions).



ophy to the other.<sup>223</sup> In an act-consequentialist system of ethics, an action is deemed morally appropriate if its consequences advance a given value or set of values more than any alternative to that action.<sup>224</sup> In the Garrow case, Luban admits that revealing the location of the bodies would better advance liberal values than would keeping Garrow's confidence;<sup>225</sup> relief of the parents' anguish more than outweighs any harm to the system of criminal justice and to other competing values.<sup>226</sup>

But revealing Garrow's secret can also be analyzed in deontological terms, in terms not of the act's external consequences, but of its internal form or the agent's motivation.<sup>227</sup> Even if Garrow's lawyer's revelation would not itself undermine the over-protection of criminal defendants, it can be faulted on other grounds. According to Luban, Armani's revelation (or, more precisely, his motive in revealing) would violate a classic deontological standard, Kant's categorical imperative: "Act only according to that maxim by which you can at the same time will that it should become a universal law."<sup>228</sup>

Why act only on such maxims? Not because your defection in a particular case will cause catastrophe; Luban has conceded that that is not true in the *Lake Pleasant* case, and that there may be relatively few cases in which it is true.<sup>229</sup> Rather, the reason is that "[f]or Kant, the universalizability formula follows from the fact that moral laws are binding universally, and that in turn follows from an underlying concern with human equality."<sup>230</sup>

Because we are addressing this point as part of an intramural dispute among egalitarians, we can properly take the concern for human equality as a given.<sup>231</sup> Moreover, we can even grant Luban that the universalizability formula is unproblematically derivable

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223. See Luban, *Mid-Course Corrections*, *supra* note 52, at 428-31. More precisely, he says he moves from act-consequentialism to a position that is either deontological or ideal rule-consequentialism, a distinction that he shows makes no difference in this context. See *id.* at 438-43; cf. J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 9-12 (1973) (Smart's analysis of Kant as a consequentialist).

224. Luban, *Mid-Course Corrections*, *supra* note 52, at 438.

225. See *id.* at 430. But see *id.* at 430 n.18 (qualifying the admission somewhat).

226. *Id.* at 431.

227. *Id.* at 428-29.

228. *Id.* at 437.

229. See *id.* at 430. Even in cases where it was true, deontological analysis would simply be a special case of act-consequentialism.

230. *Id.* at 439.

231. For a discussion of the egalitarian premise, see *supra* note 215 and accompanying text.

from the commitment to human equality.<sup>232</sup> Even on these assumptions, however, it does not necessarily follow that breaching what purport to be collectively beneficial schemes shows disrespect for one's fellows, either in the *Lake Pleasant* case itself or more generally.

To see why this is so, we must first note that there are two ways the maxim of an action may fail the Kantian generalization requirement. In Kant's words,

Some actions are of such a nature that their maxims cannot even be *thought* as a universal law of nature without contradiction, far from it being possible that one could will it to be such. In others this internal impossibility is not found, though it is still impossible to *will* that their maxim should be raised to the universality of a law of nature, because such a will would contradict itself.<sup>233</sup>

Following Paul Dietrichson's analysis, we can conveniently refer to these as the primary and secondary tests for universalizability.<sup>234</sup>

In the *Lake Pleasant* case, the maxim prompting revelation of the bodies can be easily enough formulated to pass both tests. One can with no risk of contradicting oneself think of the following rule: Keep client secrets inviolate except when doing so would, in the judgment of a reasonable lawyer, cause extreme physical or emotional harm to a third party and when that harm would outweigh the harm revelation causes the client and similarly situated clients.<sup>235</sup> This rule, of course, bristles with interpretive problems, most saliently the standard recourse to the reasonable person. It is not, however, internally inconsistent, and it nicely covers the *Lake Pleasant* case. Furthermore, to return to what Luban rightly takes to be the core of Kantian ethics, it treats similarly situated persons the same as you, the agent, are treating yourself: anyone else in a similar dilemma is offered the same out. As Luban points out, we—liberals, that is—feel outraged at those who treat themselves as special cases.<sup>236</sup> This is true (and fair) enough. But such outrage is quite out of place here, where we have a general rule available to all.

My revelation rule fares equally well under the secondary test.

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232. See Haezrahi, *supra* note 215.

233. KANT, *supra* note 215, at 47-48.

234. Paul Dietrichson, *Kant's Criteria of Universalizability*, in KANT, *supra* note 215, at 184-85.

235. The present exceptions to Rule 1.6 of the Model Rules, in both their original ABA version and in the more expansive version adopted in Florida, see FLA. STAT. ANN., Rules Regulating the Florida Bar, Rule 4-1.6 (West Supp. 1992), are arguably instantiations of just such an approach. See MODEL RULES, *supra* note 43, Rule 1.6.

236. See Luban, *Mid-Course Corrections*, *supra* note 52, at 439.

Not only can you think its universalization without contradicting yourself; you can also will it. This becomes clear if we look closely at Luban's argument to the contrary. According to Luban's preferred reading of the categorical imperative,

An agent can assume that he is permitted to adopt a particular maxim just in case he can will that everyone should *be permitted* to adopt it. To check this, he must then imagine a world like ours—with the one modification that everyone feels (morally) free to adopt his maxim.<sup>237</sup>

In applying this test in the context of lawyer-client confidentiality, Luban asks and answers much too broad a question:

[W]e ask what would happen if lawyers were permitted to reveal client confidences at will. The most common answer is that in a world in which lawyers were permitted to reveal client confidences at will, clients would conceal information from their lawyers that might prove vital for successful, or even minimally competent, representation. We then conclude that confidentiality is an important role obligation for lawyers.<sup>238</sup>

Even if this analysis justifies a general confidentiality rule, it hardly precludes an exception for the *Lake Pleasant* case. It may be that to obtain the information necessary for lawyers to represent clients adequately, we must forbid "reveal[ing] client confidences at will."<sup>239</sup> But my rule for the *Lake Pleasant* and similar cases permits

237. *Id.* at 437 (quoting T. Pogge, *The Categorical Imperative* 2 (1986) (unpublished manuscript)). It is worth noting here that the "like ours" clause threatens to reduce the categorical imperative to a hypothetical imperative of the form, "If you want a society like ours, do (or do not do) this (or that)." This shift from categorical to hypothetical imperative is certainly evident in the Kantian work Luban cites, where Kant seems at times rather explicitly to have Enlightenment Prussia as his paradigm of a society "like ours." See KANT, *supra* note 215. Thus, for example, Kant's problem with a universalized rule that does not require development of individual talents is not that it is unthinkable in the abstract or even that we cannot consistently will it, but that it would create the society of Bougainville and Cook's Polynesia, rather than Frederick and Kant's Prussia. See *id.* at 46-47. The shift from categorical to hypothetical imperative is quite harmless at this point in Luban's argument, which, as I have said, is an intramural debate among contemporary liberals. Nevertheless, it does imply that Luban's most ambitious claim, legitimate coercion of those whose conception of society is not "like ours," will have to rest on another, broader foundation, or a different reading of Kant's *Foundations*.

238. Luban, *Mid-Course Corrections*, *supra* note 52, at 436. In the omitted footnote following this passage, Luban reminds us that, in his fuller discussion of confidentiality, he subjects it to much broader limits than those in the official lawyer codes of most states. *Id.* at 436 n.35. For our purposes, however, the important point is that these exceptions do not call for revelation in the Garrow case.

239. *Id.* at 436. Mike W. Martin takes a similar step in arguing for doctor-patient confidentiality: "there is no question that if doctors freely divulged personal informa-

revealing confidences not "at will," but only under extremes specified in advance. Generalized permission—or even obligation—to reveal in those extreme situations need not undermine successfully representing clients as a general matter. As Luban himself admits, no one knows whether, and to what extent, clients really rely on an assurance of confidentiality.<sup>240</sup> Indeed, empirical evidence tends to belie the high level of reliance traditionally asserted, at least as to hard cases like *Lake Pleasant*.<sup>241</sup>

Even if I am right that revelation in the *Lake Pleasant* case passes both the primary and the secondary tests of Kantian universalizability, the question remains whether the maxim behind that revelation could, consistently with those tests, be applied generally to laws or putatively beneficial cooperative schemes with the force of law. The arguably overbroad confidentiality rule that I suggest a Kantian could conscientiously disobey in the *Lake Pleasant* case is, after all, but one law. Luban may still be right that the maxim "ignore any collectively beneficial scheme with which you disagree" may not be universalizable.<sup>242</sup>

This can, I think, be shown not to be true under the primary test. Without logically contradicting yourself, and without making an exception for your own case, you could quite easily universalize the maxim: I will deem myself obliged to obey only the laws I believe confer collective benefits; you feel free to do the same.<sup>243</sup> This is all that the primary test of universalizability requires.

Whether the maxim meets the secondary test, however, is less clear because of ambiguity in the key phrase "a world like ours." The problem is that Luban and the libertarians want different

tion about patients medical practice would then be harmed." Mike W. Martin, *Rights and the Meta-Ethics of Professional Morality*, 91 ETHICS 619, 625 (1981).

240. David Luban, *Against Autarky*, 34 J. LEGAL EDUC. 176, 181 (1984) [hereinafter Luban, *Against Autarky*] (noting that the standard defense of attorney-client confidentiality rests on an untested premise of client knowledge of, and reliance on, the strict rule of confidentiality).

241. Luban, *Mid-Course Corrections*, *supra* note 52, at 430 (citing Fred C. Zacharias, *Re-thinking Confidentiality*, 74 IOWA L. REV. 351, 383 (1989)); *see also* Freedman, *supra* note 137, at 629 (arguing against empirical claims of need for testimonial privilege to elicit medical information from patients); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1172 (1985) (concluding that a sweeping rule of confidentiality is not "required to protect the rights of individuals or society"); Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1236 (1962) (concluding that nonlawyers generally misunderstand the scope of the attorney-client privilege).

242. *See* Luban, *Mid-Course Corrections*, *supra* note 52, at 442-43.

243. *See* Ellmann, *supra* note 13, at 135-36. Philip Soper makes essentially the same point in his review of Dworkin's *Law's Empire*. *See* Soper, *supra* note 217, at 1184-85.

worlds. The libertarians value a world free of collective coercion over a world with relatively more cooperative schemes. In other words, for libertarians the most beneficial of all cooperative schemes is a polity in which individuals are not coerced by the collective to participate in schemes they deem dubious. Here we are at an impasse, unless Luban can show, within the confines of secular egalitarian humanism, why what he wants is better, why he is right in placing a higher premium than his libertarian opponents on cooperative schemes.<sup>244</sup>

There are several ways Luban might go here. He might argue that the libertarian maxim will produce not a world with fewer beneficial cooperative schemes, but a world devoid of all law and social order. Luban does not take that approach. Another avenue would be to seek a higher rule, either within liberalism or above it, to establish his preference for cooperative schemes. We will follow him down that avenue in a moment; it leads to his most ambitious claim. A third avenue, and the one I want to turn to now, is the argument that abandoning dubious cooperative schemes harms not the community so much as the dissident.

*b. The Threat to Moral Integrity.*—Luban's second approach shifts focus from macrocosm to microcosm, from the effects on the world of generalizing disobedience to laws with which one disagrees, to the effects of this generalized disobedience on the self. Luban is at pains to show that the result is complete personal and professional disintegration.

Luban builds his disintegration claim upon the following case:

Take, for example, a hypothetical public defender we shall call Cecilia, whose docket contains many guilty, violent, and unrepentant clients. Cecilia accepts the moral importance of zealous advocacy in criminal defense, and understands herself as a faithful and stalwart adherent to the advocate's role. Indeed, understanding herself that way is essential for her integrity as a lawyer—what we may call her "professional integrity." Her professional integrity will be one important component of her moral integrity as

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244. As Luban himself notes at another point, Hegel long ago faulted Kant's universalizability test on the ground that, in application, two sets of diametrically opposed maxims can pass the test. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 113-14. What Luban fails to notice, both there and here, is that giving enough content to the test to make it distinguish between such maxims involves a value choice not itself subject to the test, a value choice, in Luban's case, in favor of contemporary liberal mores.

a whole.<sup>245</sup>

Responding, again, to David Wasserman, Luban argues that Cecilia as an act consequentialist faces a dilemma. On the one hand, she is pressed by her ordinary moral commitments to "incapacitate[] her dangerous client";<sup>246</sup> on the other hand, she is drawn by her commitments as a criminal defense lawyer to defend such a client even to the extent of securing an acquittal. In any particular case, Cecilia as act consequentialist will usually be able, or morally compelled, to resolve the dilemma in favor of departing from her role-obligation, since the good effects of departing (getting dangerous characters off the streets, for example) will outweigh the systemic harm to the criminal defense lawyer's role and the underlying public policy of overprotecting criminal defendants. What makes her position untenable, Luban maintains, is the fact that her professional career is really a series of such dilemmas. As a public defender, she can reasonably expect that most of her clients are, in fact, guilty, and in each case her personal morality presses her to sell them out.

The act-consequentialist's response to this series of dilemmas produces a paradox. Commitment to her act-consequentialist ordinary morality forces her to depart from her role-obligation in each particular case in order to maintain her integrity as a moral person, yet the cumulative effect of these defections is to undermine her professional commitment to the role of criminal defense lawyer. The erosion of this latter commitment undercuts her professional integrity, which is also, as we have seen, "one important component of her moral integrity as a whole."<sup>247</sup> As Luban sums up the paradox, "what is morally right, and essential to her integrity on an episodic, or case-by-case-basis, is disastrous when the cases are taken collectively."<sup>248</sup> On the strength of this example, Luban concludes that, unless we as lawyers make the honoring of role-obligations, as justified by the fourfold root analysis, our "default mode," we ultimately sacrifice not just our professional, but also our personal, integrity.<sup>249</sup>

But the Cecilia story simply will not sustain so general a conclusion. To see why not, we must first see how the Cecilia story fits into the implicit syllogism from which that conclusion is derived. The syllogism runs like this:

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245. Luban, *Mid-Course Corrections*, *supra* note 52, at 448.

246. *Id.*

247. *Id.* at 448-49.

248. *Id.* at 449.

249. *See id.* at 451.

1. Integrity either is itself good or is a necessary condition of being human, and therefore of being a good human.

2. To have integrity, you must faithfully perform the role acts required by your publicly determined role.

3. Therefore, only those lawyers who follow public role morality can be good people.

Though both premises are subject to challenge, only the second—that conformity to publicly determined roles is necessary for integrity—need concern us here.<sup>250</sup> Not all secular egalitarian humanists will agree on it, a fact that Luban implicitly acknowledges by offering his Cecilia example to the unpersuaded.

What Luban's Cecilia example illustrates is not the second premise in the syllogism, but a much narrower point—you cannot depart from a principle in which you believe every time that principle is applicable, and still retain your personal integrity. To do so would, indeed, present a paradox of belief and action.<sup>251</sup> This is true almost as a matter of definition, and true in either of two ways, depending on which critical term, integrity or belief, you define by reference to the other. For Luban, integrity implicitly includes fidelity to rules you believe to be justified by the fourfold root; accordingly, to break those rules repeatedly is to lack integrity.<sup>252</sup> For existentialists, to believe in a principle is to be committed to it, and to be committed to it is to act upon it. Accordingly, to violate a principle consistently is simply to show that you are not really com-

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250. The first premise—that integrity is necessary to be a human, or a good human—can be challenged on both factual and normative grounds. The example of Dostoevsky's *Underground Man*, fictional though it is, casts doubt on whether human existence as a matter of fact requires integrity. Fyodor M. Dostoevsky, *Notes from Underground* (Constance Garrett trans.), in *EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE* 52 (Walter Kaufmann ed., 1975). If the *Underground Man* has integrity, it is a peculiarly limiting case, the ethical equivalent of Heraclitus's metaphysics: The only thing permanent is change itself. *THE PRESOCRATICS* 70-71 (Philip Wheelwright ed., 1966). This is hardly the kind of integrity Luban is seeking. On the other hand, to say that the *Underground Man*'s life is, though possible, not good, is to make an unsubstantiated normative claim. See BARNES, *supra* note 110, at 3-28 (discussing the position of the *Underground Man* as distinct from both traditional morality and the moral position of existentialism). Because it is not a claim that Luban's intended audience of fellow liberals is likely to dispute, we can safely leave it aside here. See ROBERT NOZICK, *THE EXAMINED LIFE* 162-66 (1989) (arguing that integrity, in the sense of "unity in diversity," is inherently valuable, and, indeed, the very structure of value).

We will return, *see infra* Part IV, to the fact that ethical skepticism cannot, consistent with its own premises, objectively condemn the *Underground Man*.

251. Luban, *Mid-Course Corrections*, *supra* note 52, at 446.

252. *See id.* at 448.

mitted to it, that you do not believe in it.<sup>253</sup> Either way, one cannot maintain one's personal integrity and consistently decline to follow the dictates of one's own principles.

But how does Luban get from this very modest, if not tautological, premise to his more general point that integrity requires obedience to public norms? In the Cecilia example, I am afraid, he begs the question by implying that the principles to which one is committed either are, or must be, public norms. In setting up the hypothetical, he tells us that "Cecilia accepts the moral importance of zealous advocacy in criminal defense, and understands herself as a faithful and stalwart adherent to the advocate's role."<sup>254</sup> But adding the fact that the norms to which Cecilia is committed are public norms does not prove that it is their very "publicness" that undermines her integrity when she violates them. I have, indeed, already given an account that is both more economical, in that it does not refer to that fact, and more general, in that it covers commitments both to private and to public norms.

But my account does not rebut Luban's assertion that departure from public norms is fatal to personal integrity. Even if it is true, as I suggest, that violations of one's own principles undermine one's integrity, it may also be true that one's integrity will inevitably be undermined in another class of cases—that in which one consistently violates public norms to which one is not personally committed.

Another feature of the Cecilia case suggests that this is true: Cecilia's violation of her publicly defined duty involves selling her clients out. If we examine that feature closely, however, we can see that it is adventitious. Cecilia may indeed be unable to depart from her publicly defined role obligations in the way that Luban suggests without sacrificing her integrity, but the reason has little to do with the fact that those role obligations are publicly defined. The reason is, rather, that one aspect of her personal morality conflicts with another.

The first aspect Luban has identified for us: Cecilia is loath to effect the release of guilty, violent, and unrepentant clients. Quite possibly, this reluctance might lead her to disagree, contrary to Luban's hypothetical, with a greater or lesser part of her publicly defined role as a defense lawyer. As Luban's general model suggests, roles are not monolithic; they comprise, instead, aggregations

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253. See OLAFSON, *supra* note 81; SARTRE, *supra* note 106, at 66-67.

254. Luban, *Mid-Course Corrections*, *supra* note 52, at 448.



of role obligations embodied in distinct though related rules. Thus Cecilia might, for example, generally agree that a liberal society should overprotect criminal defendants by requiring the state to meet a high burden of proof. She might further agree that holding the state to this burden requires criminal defense lawyers to get truly guilty defendants acquitted in some cases. Yet, quite consistently with those beliefs, she might also believe that evidence that would meet the government's burden should not be excluded because it was improperly acquired.<sup>255</sup> Similarly, she might believe that, in putting the government to its proof, she should not argue to the jury as true alternative accounts she knows to be false.<sup>256</sup> More radically still, but still within the bounds of liberalism, she might believe, with Bentham, that the confidentiality of lawyer-client communications should not apply to the guilty.<sup>257</sup>

Any of these positions would put her at odds with the dictates of her role. This, then, appears to pose the critical question nicely: Could Cecilia depart from her publicly defined role obligations without sacrificing her personal integrity? We are led to think that the answer is "no" by a second aspect of her character that is at odds with selling out clients. Implicit in Luban's hypothetical is another of Cecilia's moral commitments, one that most of us share. We can reasonably surmise, though Luban does not tell us in so many words, that Cecilia is loath not only to put her more odious clients back on the street, but also to sell them out. Even if she believes that selling out such clients will not undermine the core purpose of the criminal defense role, we can empathize with her finding it impossible to do, for any one of several related reasons.

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255. See, e.g., *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 412 (1971) (Burger, C.J., dissenting) (criticizing the exclusionary rule and proposing congressional enactment of an alternative remedy); *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo rejecting the exclusionary rule in New York with the observation that, under the rule, "[t]he criminal is to go free because the constable has blundered").

256. See Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 Sw. L.J. 1135 (1988); Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 GEO. J. LEGAL ETHICS 689 (1988) [hereinafter Subin, *Is This Lie Necessary?*]; Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987) [hereinafter Subin, *Different Mission*].

257. Luban discusses and rejects Bentham's position, on nonutilitarian grounds, in *LAWYERS AND JUSTICE*, *supra* note 2, at 189-97. Whether Bentham's argument is rebuttable, either on its own terms or in terms of the rights analysis that Bentham dismissed as "nonsense on stilts," *id.* at 368, it is certainly an argument with an impeccable secular egalitarian humanist pedigree. Moreover, it is an argument that has contemporary liberal sympathizers. See Alan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER*, *supra* note 2, at 123, 146.

She may be deeply personally committed to keeping secrets secret, either as a matter of choice or as a matter of nonvolitional moral disposition.<sup>258</sup> Alternatively, she may object to placing the particular clients she represents in a worse position than they would have been in if they had drawn a true-believer public defender instead of her. Although she rejects the general justification of working to acquit violent, guilty, and unrepentant defendants, she may think it unfair to her clients, not her fellow citizens generally, to break that rule piecemeal and clandestinely in her clients' cases. If this is so, then Cecilia cannot depart from her public role obligation without loss of personal integrity. But the reason is not that which Luban suggests.

You will note, however, that Cecilia's personal opposition to selling out clients is not wholly divorced from her publicly defined role obligation. Under Luban's fourfold root analysis, the justification of the criminal defense lawyer's role and its component obligations is to overprotect criminal defendants against the state. That role arguably forbids selling out clients on rule-consequentialist grounds. Cecilia's grounds are, as we have seen, different, but they press her in the same direction. Thus, we find that the Cecilia example does not adequately isolate for us a conflict between the dictates of individual conscience and the dictates of role, a conflict in which we could test Luban's loss of integrity argument.<sup>259</sup>

We could, of course, produce such a conflict by imagining a Cecilia who is not bothered by the sell-out factor. She may have no moral qualms about selling out the guilty, or her qualms may be outweighed by her aversion to putting sociopaths back on the street. But such a Cecilia would bother most of us deeply. It would be hard for us to assess whether she maintains her personal integrity or not, because we find what that integrity entails—the selling out of clients—to be deeply troubling. It is appropriate to make explicit at this point what the implicit standard of proof so far has been, both for me and, I think, for Luban.<sup>260</sup> The standard of proof has been a life that not only meets the requirement of formal consistency and

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258. See Williams, *supra* note 17, at 259, 263-64 (contrasting general moral dispositions with professional dispositions and showing how the two may conflict even when a lawyer believes a professional role-act to be morally justified).

259. Wasserman has made this point more generally: "There is . . . no reason to believe that such ordinary moral obligations [as, for example, the sell-out prohibition] are always available to support a role-act with a consequentialist justification." Wasserman, *supra* note 26, at 403-04 n.68.

260. This standard, in effect, applies the two-part Kantian test we encountered above, see *supra* notes 233-234 and accompanying text, to an entire way of life, not just to a

integrity, but also embodies substantive values in a way that is acceptable to liberals, not necessarily as the life each would choose to live, but as a life most liberals could respect. Under this standard, portraying Cecilia as a kind of "Dirty Harriet" in the PD's office would be to make Luban's case, if not his day.

There is, however, a more sympathetic example that squarely raises the issue of departure from public role norms for reasons of individual conscience. It is the example of the criminal defense lawyer faced with client perjury. Like Cecilia's case, this example involves both the publicly defined role of criminal defense lawyers and the sellout factor. In this case, however, the sellout factor cuts the other way, in favor of the client and against public role norms, for in this context it is the rules themselves that require selling the client out. Here the defense lawyer is tempted to bend the rules in favor of the client, rather than to the client's disadvantage.

Monroe Freedman has long argued that a criminal defense lawyer has (or, more recently, should have) a professional obligation, an enforceable duty under the lawyer codes, to present testimony the lawyer knows to be perjurious no differently from other testimony.<sup>261</sup> The lawyer faced with client perjury, Freedman concedes, faces a trilemma, a conflict of three role obligations: to find out everything about the client's case, in order to present an effective defense; to keep information about the case communicated by the client in absolute confidence, in order to encourage the client to reveal the facts the lawyer needs for the defense; and to be candid with the tribunal, in order to prevent false evidence from distorting the search for truth.<sup>262</sup> In the case of perjury, as Freedman tersely put it, "the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court."<sup>263</sup> Obviously, something has

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particular course of action. It is an application, within the perimeters of liberalism, of a principle that Isaiah Berlin maintains can be applied across cultures:

Members of one culture can, by the force of imaginative insight, understand . . . the values, the ideals, the forms of life of another culture or society . . . . They may find these values unacceptable, but if they open their minds sufficiently they can grasp how one might be a full human being . . . and at the same time live in the light of values widely different from one's own, but which nevertheless one can see to be values, ends of life, by the realisation of which men could be fulfilled.

ISAIAH BERLIN, *On The Pursuit of the Ideal*, in *CROOKED TIMBER OF HUMANITY* 10 (Henry Hardy ed., 1990).

261. Freedman first took this position in Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475-78 (1966).

262. MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 27-28 (1975).

263. *Id.* at 28.

to give; we must impale ourselves on at least one horn. None of the choices is entirely attractive; here reasonable people can differ, and have.<sup>264</sup> I have set this stage, not to resolve what Freedman rightly regards as a trilemma, nor to offer my own choice of whose ox—or sacred cow—should get gored. Rather, I want to spotlight the role Freedman has played in the drama, and to contrast it with another role, a role that is, depending on your perspective, more heroic or villainous or quixotic but—and this is my central point—no less viable, no less consistent with personal and professional integrity.

Freedman's role has been that of the law's loyal opposition. In his earliest writing on the subject, Freedman argued that his approach to perjury not only was preferable to, but also was consistent with, if not required by, the then-applicable American Bar Association (ABA) Code.<sup>265</sup> When an amendment to a subsequent ABA code made that argument strained, if not untenable, Freedman spearheaded the drive for a counter-amendment.<sup>266</sup> When the ABA, in drafts of its third official code, moved toward its present candor-over-confidentiality position, Freedman drafted a competing code that embodied his position.<sup>267</sup> Most recently, when the United States Supreme Court upheld a threatened revelation of intended perjury against a Sixth Amendment ineffective assistance of counsel challenge,<sup>268</sup> Freedman came forward with an article narrowly construing the holding,<sup>269</sup> suggesting alternative constitutional chal-

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264. Freedman and the ABA, as we shall see, respectively opt for sacrificing candor and for sacrificing confidentiality. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 183. The Canadian Bar Association sacrifices full disclosure by client to lawyer, according to Freedman, by requiring that lawyers warn clients at the outset that perjury will be revealed. See FREEDMAN, *supra* note 262, at 38.

265. See Freedman, *supra* note 261, at 1477-78. Freedman also argued that his position did not violate state criminal laws forbidding subornation of perjury. See FREEDMAN, *supra* note 262, at 31.

266. See FREEDMAN, *supra* note 262, at 28-29 (noting that Freedman's version was first adopted by the District of Columbia bar, then by the ABA). The amended ABA rule was a paradigm of opacity. See Ronald D. Rotunda, *Officers, Directors, and Their Professional Advisers—Rights, Duties, and Liabilities*, 1 CORP. L. REV. 34 (1978).

267. See THE AMERICAN LAWYER'S CODE OF CONDUCT Rule 1.6 (Rev. Draft 1982). Monroe Freedman was the Reporter for the June 1980 Public Discussion Draft. Initially, the discussion draft of his code was strongly client-protective. In a revised draft, Freedman weakened his rule by requiring that lawyers reveal client confidences where there was an "imminent danger to human life." This revised draft, however, was still not approved by the American Trial Lawyer's Foundation (ATLF) commission. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 183.

268. See *Nix v. Whiteside*, 475 U.S. 157 (1986).

269. See Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1946 (1988) (concluding that "the key question re-

lenges to the ABA position,<sup>270</sup> and insisting that the proper conduct of a lawyer faced with the trilemma is still uncertain.<sup>271</sup>

But at every point in what has become a rear-guard action against the ABA's candor-over-confidentiality position, Freedman has been unfailingly loyal to the law, in two ways. First, he has from the beginning maintained that "before the client testifies perjurally, the lawyer has a duty to attempt to dissuade him on grounds of both law and morality."<sup>272</sup> Second, he has never argued that an individual lawyer faced with the trilemma should handle it in any way other than that which prevailing law dictates.<sup>273</sup> Thus he has implicitly accepted Luban's obedience point.

But—and this is my central point in this subsection—Freedman need not have accepted that point to maintain either professional or personal integrity. Rather, he could have concluded that putting in perjured testimony serves values more significant for him than obedience to the dictates of the law on that point. He could have taken that view only as to those clients he thinks are innocent, but who face conviction on false evidence or erroneous testimony.<sup>274</sup> He might also have taken it as to all criminal defendants, either on the rule-consequentialist argument that he emphasizes or on an alternative, deontological position that he sketches: "the criminal defendant has a 'right to tell his story' " when faced with the "horrors of imprisonment," even if that story is a lie.<sup>275</sup> Unlike Cecilia, a lawyer of this mind quite plausibly could function in violation of the present ABA position, ensconced though it is in law, without any loss of personal integrity. But like Cecilia, the contemplated departure is

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mains unanswered: what standard of knowing is required before a lawyer may threaten to reveal a client confidence to prevent the client from committing perjury?"

270. See *id.* at 1946-52 (analyzing various arguments that an obligation to threaten disclosure of a criminal defendant's perjury violates the Fifth Amendment's protection against compelled self-incrimination).

271. See *id.* at 1952-55. The ABA, for its part, was no less eager to put its own spin on the *Nix* opinion. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987) (analyzing a lawyer's responsibility with respect to client perjury after *Nix* and insisting that Freedman's position, explicitly identified as his, was no longer tenable).

272. See Freedman, *supra* note 261, at 1478.

273. See *id.*

274. See, e.g., FREEDMAN, *supra* note 262, at 30-31 (giving a heart-tugging example of such a case).

275. See *id.* at 31 (suggesting that this position is reflected in the civil law practice of permitting criminal defendants to testify without oaths); see also SHAFFER, *supra* note 2, at 94-95 (arguing that even if a client has indicated an intention to commit perjury, a criminal defense lawyer should, as an expression of faith in the client, let the client testify after urging truthfulness).

from a central, not peripheral, aspect of the lawyerly role; it may, indeed, be the perception of that centrality that occasions the departure.

Freedman himself acknowledges this point, albeit somewhat begrudgingly, in a short concluding paragraph on lawyers who falsify evidence for clients "from a personal sense of justice: those lawyers who choose that role . . . must do so on their own moral responsibility and at their own risk, and without the sanction of generalized standards of professional responsibility."<sup>276</sup> This is a carefully worded concession, and several elements warrant elaboration, some here, some in Part IV.<sup>277</sup>

In the first place, Freedman is right to describe this position, this way of practicing law, as a role. This is important because Luban is at great pains to demonstrate both the factual impossibility and the moral repugnance of trying to live one's moral life fully outside social roles. As to the factual impossibility, Luban observes that "[c]ommon morality cannot be described without incorporating reference to social roles: if it is, the result is empty and barren."<sup>278</sup> True enough—it is conceptually muddled to say that, in the circumstances of the *Lake Pleasant* case, one should follow ordinary morality and not lawyerly morality. A nonlawyer cannot get into that predicament and many others that lawyers must face. The real question is how an ordinary person who is a lawyer should respond to the especially uncomfortable situations peculiar to the lawyerly role.<sup>279</sup>

But to say that an intelligible answer cannot be given if the social role is abstracted away is not to say that the morally right answer is the one dictated by the socially approved parameters of role. Social expectations are in this context, as in all others, part of the factual context. Unless we are to reduce morality to mores, we are entitled to ask whether it is right, as opposed to expected, that one do what one's social role demands.<sup>280</sup>

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276. FREEDMAN, *supra* note 262, at 76.

277. One of the factors to be deferred is that Robin was not in the forest alone. The relevance of his fellow outlaws will become clearer in Subpart IV.B.2, where I take up the role of community in fideist ethics.

278. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 115.

279. *Id.* at 114-15; see also Williams, *supra* note 17, at 260; Schneyer, *supra* note 33, at 1536.

280. This point has an important corollary. Just as it would confuse the "is" with the "ought" to say here that the right thing to do is what one's social role demands, so it would also confuse the two to conclude that the degree to which one may properly depart from role is to be derived from what society accepts as a proper departure. Society may accept as proper a certain degree of "role distancing" on the part of various role occupants, from doctors in surgery to children on merry-go-rounds. LUBAN, *LAWYERS*

In assimilating a role he rejects to that of Robin Hood, Freedman underscores a real danger,<sup>281</sup> a danger that Luban, too, perceives when he brands as excessively romantic those who flout publicly defined role obligations on grounds of individual conscience.<sup>282</sup> Luban identifies three morally repugnant "roles-that-reject-roles": the Bohemian poseur, "the man or woman beyond roles," who "reject[s] social roles in never-to-be-forgotten evenings"; the moral bully, who "make[s] a practice of denouncing hypocrisy," a "recognized (and hypocritical) role"; and the overgrown adolescent, who "stand[s] at life's crossroads with ideals too high for the compromises of professional roles—as well as a belief that his own 'authenticity' is not to be sullied by the light of the public that darkens everything."<sup>283</sup>

These barbs are sharp, but if their point is to deny that there are other alternatives to deferring to socially acceptable role obligations, Luban is wide of the mark. Certainly as incarnated in Errol Flynn, and even in the carefully politically correct Kevin Costner, Robin Hood has an unmistakable aura of machismo about him.<sup>284</sup>

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AND JUSTICE, *supra* note 2, at 106-07 (citing ERVING GOFFMAN, *ENCOUNTERS* 85 (1961)). We can, however, still ask what degree of departure is morally appropriate. Trying to derive the morally appropriate from the socially acceptable in the way that Luban suggests is to invite Hume's query about deriving an "ought" from an "is." See Geoffrey C. Hazard, Jr., *Communitarian Ethics and Legal Justification*, 59 U. COLO. L. REV. 721, 735 (1988) [hereinafter Hazard, *Communitarian Ethics*]. But cf. Geoffrey C. Hazard, Jr., *My Station as a Lawyer*, 6 GA. ST. U. L. REV. 1 (1989) [hereinafter Hazard, *My Station as a Lawyer*] (arguing that what is morally correct for a lawyer is determined by the function of a lawyer in society).

This is the point of Sartre's famous waiter story. See SARTRE, *supra* note 104, at 71-79. Sartre's point is not that it is bad faith to occupy a social role, as Luban shows is inevitable. But it is bad faith to take the socially defined parameters of one's role as determinative of one's self, as either what one is or what one ought to be. See OLAFSON, *supra* note 81, at 112 n.7; BARNES, *supra* note 110, at 81-86; cf. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 115 ("Nor should it be forgotten that Sartre, who argued that role identification is bad faith, argued also that identification with a 'Me' that is not my role is bad faith as well.").

281. See FREEDMAN, *supra* note 262, at 76.

282. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 115; Luban, *Mid-Course Corrections*, *supra* note 52, at 443; see also LUBAN, *LAWYERS AND JUSTICE*, *supra*, at xix (rejecting the suggestion that lawyers who decline to work moral harms at the behest of their clients are "Robin Hoods in business suits").

283. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 115; see also ROBERT P. WOLFF, IN *DEFENSE OF ANARCHISM* 74 (1970) ("Even the social rebel characteristically opts for an existing role, that of bohemian, or beatnik, or revolutionary."). It is somewhat misleading to suggest that Luban merely identifies these roles-that-reject-roles; in fact, he elaborates them in lurid detail. I deal with the Dorian Gray quality of the portraits below, *infra* text accompanying notes 410-411, in my treatment of why Luban and others fear the consequences of moral skepticism.

284. This is true, as well, of the Robin Hood of folklore, who "foreshadows the world

But swashbuckling was not Robin's only business, and rescuing damsels in distress was barely a sideline. Robin was the original wealth redistributor, and, more generally, the prototypical righter of legally countenanced wrongs.<sup>285</sup> We would do well, no doubt, to scrub that role clean of infantile (male) self-fixation. But we scrubbers should take care all the while not to become enamored of our own reflection in the washbasin, and not to dump a significant social role with the bathwater. Robin Hood is no Holden Caulfield;<sup>286</sup> those who adopt the former's role must be, not just muse about being, the catcher in the rye. Here, again, Freedman's description is on target. Those who adopt Robin Hood's role must take personal moral responsibility for their departure from public norms. There is no denying that, under the regime of his day, Robin Hood's redistributive mechanism was theft, and that theft bore a serious penalty, just as departing from central obligations of the lawyer codes does today. Yet for Robin Hood to have shown respect for the law by taking his legal punishment would have been the ultimate narcissism. The peasants did not need a martyr; what they needed was money.

This underscores a final point implicit in Freedman's description of the Robin Hood role. In both its classic and its modern variations, a primary source of its appeal has been that it involves helping other people.<sup>287</sup> To the original idea of robbing from the rich to give to the poor, Freedman adds contemporary analogies:

the criminal defense lawyer who knows that prison is a horror and who believes that no human being should be subjected to such inhumanity; the negligence lawyer who resents the arbitrary rules that prevent a seriously injured and impoverished individual from recovering from an insurance company; the prosecutor who does not want to see a vicious criminal once again turned loose upon innocent citizens because of a technical defense; . . . the tax attorney who resents an arbitrary and unfair system that leaves Peter with his wealth while mulcting Paul.<sup>288</sup>

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of superman and the comic strip." J.C. HOLT, *ROBIN HOOD* 10 (1982). For a brief survey of Robin's career in cinema, see Chris Chase, *Robin Hood Adds Up to a Thief for the Ages*, N.Y. TIMES, June 23, 1991, § 2, at 13.

285. It is not clear that the original Robin Hood was either, though both aspects of the role gained early and enduring prominence. HOLT, *supra* note 284, at 8-10, 38-39.

286. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 115-16 (referring to Holden Caulfield as the epitome of adolescent idealism).

287. See HOLT, *supra* note 284, at 10.

288. FREEDMAN, *supra* note 262, at 76.



Nevertheless, the very viability of the Robin Hood role does produce an apparent paradox, which we can see by returning to Cecilia's case. Remember that, depending on how we define Cecilia's personal moral commitments, she can either be a good person and a good criminal defense lawyer in violation of critical obligations of that role, as publicly defined, or she cannot be a good person and a good lawyer despite compliance with these norms. This is only a paradox, however, from the perspective of a metaethical position that assumes right answers to moral questions. From the perspective of metaethical skepticism, the paradox disappears because personal moral integrity depends on fidelity to one's own personal moral commitments rather than to monolithic public norms. There is more than one way to be, or fail to be, a good person and a good lawyer (in criminal defense or other areas) because there is no one single measure of a good person, or a good lawyer. The critical principle is the one that poor Polonius announced but could not live by—to your own self be true.<sup>289</sup>

But to say that there are various ways to be a good person and a good lawyer from one's own perspective is not to say that they are equally valid and entitled to respect either from some higher, common, "midair" perspective or from the perspective of secular egalitarian humanism. If Luban and I disagree on whether there is only one true way to be a good person and a good lawyer, we agree in rejecting one way, the way of the old role morality. Performing the duties of one's lawyerly role is no guarantee of personal moral integrity. I join Luban in emphatically disaffirming "the moral liberty of a lawyer to make his life out of what personal scraps and shards of motivation his inclination and character suggest: idealism, greed, curiosity, love of luxury, love of travel, a need for adventure or repose; only so long as these lead him to give wise and faithful counsel."<sup>290</sup> Eliot's Thomas à Becket may have been wrong here: the

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289. Luban takes this advice to be a call for the kind of egoism that "is the number one cause of marital infidelity and child desertion." Luban, *Partisanship*, *supra* note 62, at 1041. But the self to which one is true can also be a self committed to unreciprocated marital fidelity or parental devotion. See, e.g., *Hosea* 1:2-3, 3:1-3 (Revised Standard) (Hosea's devotion to Gomer); 2 *Samuel* 18 (David's devotion to Absalom). The problem with Polonius was less that he was "a fountain of bad advice," Luban, *supra*, at 1041, than that he did not heed his own good advice.

290. Fried, *supra* note 2, at 1088-89. This suggestion by itself should make us understand, if not entirely forgive, the bitterness of Leff and Dauer's reply to Fried. See Edward A. Dauer & Arthur A. Leff, Correspondence, *The Lawyer as Friend*, 86 *YALE L.J.* 573 (1977) (commenting on Fried, *supra* note 2); see also WOLFRAM, *supra* note 4, at 76 n.49 (describing Dauer and Leff's reply as "[a] sometimes telling but uncomfortably savage critique"). With them, but for the benefit of their example, go I.

highest treason is not to do the right thing for the wrong reason, but to do so while invoking the right reason or asserting that motive does not matter.<sup>291</sup> Even if love of money is the root of all evil, there must be one evil lower: to dig for that dark root while purporting to be cultivating justice and the common good. It is no wonder that, after a lifetime of such digging, Dickens' Mr. Jaggers is continually washing the dirt from his hands.<sup>292</sup>

But Robin Hood, you will finally object, had right—publicly, if not cosmically, determined right—on his side. He resisted the powers-that-were—the sheriff of Nottingham and the usurping Prince John—in fidelity not to his own vision of justice, but to Richard the Lionhearted, legitimate king, defender of the faith, indeed, crusader extraordinaire.<sup>293</sup> In this section, I have been at pains to show that this faithfulness to legitimacy is not essential to moral integrity; in the next, I will argue that the two are at times inconsistent. Claims of objective legitimacy make Robin Hood's position—and Cecilia's—more rather than less problematic.

2. *Luban's Modest Intramural Claim.*—Luban's modest intramural claim is that the fourfold root is a viable way of being a good person and a good lawyer within the premises of secular egalitarian humanism.<sup>294</sup> To sustain this position, Luban must address a problem he himself acknowledges.

Reflexive, universal deference to public role norms is stultifying;<sup>295</sup> it is, after all, precisely the old role morality against which he is arguing. In his own system, public role norms that purport to implement collectively beneficial schemes are presumptively valid and binding, but the presumption is rebuttable.<sup>296</sup> What he must give us, then, is a chart between the Scylla of individualist ethics and

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291. See Stier, *supra* note 2, at 604 ("Integrity depends on the reasons which determine the legal actor's actions.").

292. Philosophical objections to the moral worth of a life based on the pursuit of wealth are as old as Aristotle, see ARISTOTLE, *NICOMACHEAN ETHICS* 9 (Martin Ostwald trans., 1962), and as new as Nozick, see NOZICK, *supra* note 250, at 177. Fried's suggestion that a life is to be judged morally acceptable on account of the desirable results it produces collapses the distinction between evaluating acts and evaluating persons—a distinction recognized even in consequentialist systems.

293. See HOLT, *supra* note 284, at 10 (portraying Robin Hood as a sustainer and vindicator of social conventions). The early stories lack the link with Richard. *Id.* at 37.

294. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 131; see also Wasserman, *supra* note 26, at 396-97; Luban, *Mid-Course Corrections*, *supra* note 52, at 424.

295. Luban, *Mid-Course Corrections*, *supra* note 52, at 443.

296. *Id.* at 432, 451-52.

the Charybdis of total absorption in collective norms, a guide as to when we defer and when we depart.

I argued in the last section that Scylla is but a mythic monster, a figment of Luban's imagination. Personal integrity is not in danger of being dashed on the rock of individualist ethics. In this section, I will argue that, by having us steer wide of this phantom shoal, Luban directs us into the whirlpool of Charybdis, a hazard equally of his own making. Here the danger is that of being caught in cross currents. On the one hand, Luban warns us against being swept along too fully in the mainstream of collective norms; on the other hand, he warns us that the counter current of our individual moral judgment will sweep us back upon the reefs of excessive individualism. The result, I will argue in this section, is a moral maelstrom from which Luban's system offers no escape.

My most ambitious claim, then, is that Luban's least ambitious claim is problematic. Honoring role obligations in the way he suggests is inherently unstable; it is new wine in old wineskins. To show why this is so, I need to specify the levels at which conflicts arise and the sources from which they come. The central problem for Luban's system—the conflict between individual conscience and collective norms—arises on several levels, levels that correspond to the several steps of the fourfold root. One may disagree with an act dictated by a rule of professional obligation, as we saw in the *Lake Pleasant* case.<sup>297</sup> Or one may disagree with a role obligation, as Monroe Freedman disagrees with the present obligation to reveal perjury.<sup>298</sup> Beyond that, one may disagree with an entire conception of the professional role, as Luban and Simon disagree with the old role morality.<sup>299</sup> Finally, at the highest level of the fourfold root analysis, one may disagree with the values that professional roles are designed to implement, as Nietzsche rejects the egalitarianism of modern western democracy.<sup>300</sup>

The impetus to depart from the demands of a publicly defined role may have several sources. One may be impelled by the spirit of the law itself, as Simon suggests.<sup>301</sup> Alternatively, one may be moved by other, but still public, norms of ordinary morality, like the general aversion to harming innocent third parties, the aversion that

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297. See *supra* Subpart I.B.2.

298. See *supra* notes 261-263 and accompanying text.

299. See *supra* Subpart I.B.3.

300. See, e.g., FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* (Walter Kaufmann & R.J. Hollingdale trans., 1969).

301. See *supra* Subpart III.A.

pressed Cecilia to want to disable her dangerous clients.<sup>302</sup> Finally, one may be motivated by norms that depart from the spirit both of the law and of public morality, norms that derive from and rest upon personal moral commitments, the morality, for example, of Monroe Freedman's Robin Hood role.

The critical question for Luban's system, when to defect from public norms, can occur at any level of analysis and can rest on any of these bases for dissent. Thus, for example, you may question whether a particular rule-dictated act is consistent with, or compelled by, a valid social policy behind the rule or, beyond that, whether the rule itself adequately advances that policy. The conflict is most problematic when it occurs at higher levels and on account of fundamental differences in values, when you question whether the policy behind the rule achieves the most desirable balancing of values, or you question the relevant values themselves. As we shall see in this section, it is conflicts at the higher levels, and for the more fundamental reasons, that Luban's system handles less well and, indeed, tends to suppress. To see why this is so, we must look at a series of conflicts between personal moral commitments and public norms, beginning at the lowest level of the fourfold root and moving to the top.

*a. Disagreement at the "Act," or Application, Level.*—Consider first disagreement with a role obligation as applied in a particular case. Sometimes the reason pressing you to depart from an act dictated by a role obligation will be a reason the creators of the obligation approve but, for reasons of difficulty in defining and enforcing exceptions, omitted from the letter of the law. As a result the law is, even in its makers' eyes, overbroad.<sup>303</sup> This phenomenon of necessary overinclusiveness may, for example, account for the nearly absolute prohibition of revealing client secrets. If so, then revelation in the *Lake Pleasant* case may have been consistent with the law's spirit, though contrary to its letter. Revelation in that case thus can be fairly easily squared with Luban's insistence on fidelity to benefi-

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302. See *supra* notes 245-246 and accompanying text. Another problem of this sort is that of discrediting truthful witnesses, a problem poignantly illustrated in Randy Bellows, *Notes of a Public Defender*, in *THE SOCIAL RESPONSIBILITIES OF LAWYERS* 69 (Philip B. Heyman & Lance Liebman eds., 1988), and extensively analyzed (though, I think, unsatisfactorily resolved) in Freedman, *supra* note 261, and Fried, *supra* note 2, at 1086.

303. Kent Greenawalt gives a detailed example of this possibility, and a useful analysis of its consequences for the morality of disobedience. See GREENAWALT, *supra* note 200, at 12-15; Simon, *Ethical Discretion*, *supra* note 12, at 1118 n.81 (noting the problem of unavoidable overbreadth).

cial cooperative schemes. One simply has to realize that laws are written for Holmes's proverbial bad man; that, in the process of plugging unintended loopholes through which he might squeeze, the drafters of laws, including those laws that govern the professional conduct of lawyers,<sup>304</sup> must occasionally, and to their chagrin, impede the way of the virtuous, those with the law's true purpose at heart.<sup>305</sup> Despairing that a more flexible rule might be twisted by unscrupulous lawyers for their own advantage, the drafters have denied Garrow's conscientious lawyers a legal means of helping innocent third parties. The law itself recognizes a general need for such latitude outside its letter in doctrines like justification, excuse, prosecutorial discretion, and executive clemency,<sup>306</sup> and popular culture frequently applauds those who transgress the narrow law for the broader good.<sup>307</sup>

How does one following Luban's theory know when it is appropriate, in a particular case, to depart from the demands of a generally good law or justified role obligation? According to Luban, "[t]he claims of role may be overridden if they are irrelevant to the case or insufficiently strong."<sup>308</sup> Very significantly, the focus in such determinations is not on the agent, the lawyer deciding whether to break with role obligations, but on the person who will be affected by the lawyer's action, whom Luban calls the moral patient. This is what Luban calls "the morality of acknowledgment"; we as moral agents are not entitled to depart from role obligations on our own behalf, but we are compelled to depart from them when the needs of others require it.<sup>309</sup>

If this distinction worked, the morality of acknowledgment would give Luban a way to resolve problems of the fairly easy sort we are now addressing, hard cases in which the application of mor-

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304. Ted Schneyer cogently argues along these lines that at least some of the aggressive advocacy rules of the lawyer codes are designed not so much to encourage what Luban calls hyperzeal as to forbid sell-outs. See Schneyer, *supra* note 33, at 1543-45; see also DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 146-47 (1974) (relating empirical evidence of the risk of selling out in lower echelons of criminal defense work).

305. This is the converse of Luban's point about loopholes. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 48.

306. Greenawalt catalogues and assesses these "institutions of amelioration." See GREENAWALT, *supra* note 200, at 271-76; see also Simon, *Ethical Discretion*, *supra* note 12, at 1116-18, 1118 n.77 (referring to justification, excuse, and jury nullification).

307. Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379, 381-84 (1987).

308. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 145.

309. *Id.* at 126-27.

ally good laws would produce unquestionably bad results. Even at this level, however, it is not without problems. As a conceptual matter, the morality of acknowledgement involves a curious, and admitted, asymmetry: "we are bound to extend to others a courtesy we are bound to refuse to ourselves."<sup>310</sup> Why, on the one hand, are we to extend the courtesy of departure from our role obligations to others? The reason, essentially, is the one we have already seen—even good laws are only good in gross. But then why, on the other hand, are we to depart only when the bluntness of general rules harms others than ourselves? Luban gives no reason not logically applicable to us; perhaps he supposes altruism to be unquestionably superior even to treating ourselves and others on equal terms.<sup>311</sup>

Even if we agree with Luban in this value judgment, there remains a further problem with the morality of acknowledgement at the level of particular acts: altruism is not an unambiguous sentiment. Depending on whose suffering or need one acknowledges, the morality of acknowledgement will counsel divergent, even incompatible, courses of action. This is the dilemma of Sartre's resistance fighter. Should he stay at home, where his mother needs him, or join the Resistance, where he can be of more help to his country and his comrades?<sup>312</sup> This dilemma also frequently appears in legal ethics. Consider, once again, the *Lake Pleasant* case. Assume, arguing, that you agree with Luban (and the law) on a general, and very client-protective, confidentiality rule in criminal defense matters. What about the grieving, and perhaps righteously indignant, families of the victims? On a slight and plausible change of the facts, what about the victims themselves, dying but not yet dead?<sup>313</sup>

It is, of course, in view of just such considerations that the rule of confidentiality admits of more or less broad exceptions in various jurisdictions.<sup>314</sup> This points to a final problem with Luban's moral-

310. *Id.* at 127.

311. In addition to being ungrounded, this implication is in tension with Luban's Kantian egalitarianism. According to Kant's "practical" version of the categorical imperative, you are to "[a]ct so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only." KANT, *supra* note 215, at 54 (emphasis added).

312. SARTRE, *supra* note 106, at 28-33.

313. Even Freedman's code would have blinked at confidentiality here. See *supra* note 267. But his constituents did not flinch. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 183; THE AMERICAN LAWYER'S CODE OF CONDUCT, *supra* note 267, Illustrative Cases 1(e)-(g). Luban's sympathies also shift here from the assailant to the victim. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 183.

314. See MODEL RULES, *supra* note 43, Rule 1.6 (permitting revelation to prevent crimes resulting in "imminent death or bodily harm"); FLA. RULES OF PROFESSIONAL

ity of acknowledgment, and a problem that takes us to the next level of the fourfold root. As Luban himself points out, the care for others that informs the morality of acknowledgment is expressed not just through departures from rules, but in rules themselves, and thus in obedience to them.<sup>315</sup> The same consideration for others that justifies departures from the rules in particular instances may give rise not just to generally recognized exceptions to the rules, as in the case of confidentiality, but also to pressure for the exception to displace the rule. Just as different focuses of altruism may counsel different responses in particular cases, so also they may counsel wider exceptions, up to and including different general rules. We have encountered an instance of this already: that part of Freedman's position on perjury that invokes the lawyer's urge to let a desperate defendant tell his story, regardless of its falsity.<sup>316</sup> If given its head, this sympathy with the defendant would unseat the present rule.

*b. Disagreement at the Higher Levels of the Fourfold Root.*—Luban himself does not find fault merely with rules as applied in particular difficult cases; he sometimes finds fault with the rules in identifiable classes of cases and calls for broad exceptions or different rules. Thus, for example, Luban criticizes the application of strict confidentiality protection in the context of large entity clients,<sup>317</sup> the requirement of destructive cross-examination of rape victims even in the context of criminal defense,<sup>318</sup> and the obligation to take unfair advantage of negotiation opponents with information they lack.<sup>319</sup>

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CONDUCT Rule 1.6 (requiring revelation to prevent crimes whether serious or not, and serious injuries whether or not caused by crimes).

315. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 146-47.

316. See *supra* text accompanying note 261.

317. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 194-95, 228-33.

318. See *id.* at 150-52. It is particularly clear here that the morality of acknowledgment is pulling Luban in opposite directions. In *Lawyers and Justice*, Luban argued that the criminal defense lawyer should not brutally cross examine the complaining witness, in view of the deterrent effect that such cross examination has on the reporting of actual rape in other cases, "even if the victim really did consent to sex with the defendant." *Id.* at 150-52. He noted, however, that "the question is a very close call," and that he arrived at his conclusion "without much confidence." *Id.* at 152. After being "take[n] to task" for this position by Ellmann, Luban retrenched a bit. See Luban, *Partisanship*, *supra* note 62, at 1026-27. He acquiesces to brutal cross examination in cases of genuine consent, but not in cases in which the client admits guilt to the lawyer, and not in typical acquaintance rape situations where the defendant maintains his innocence, but argues implicit consent on dubious facts. See *id.* at 1027-32. None of this is to deny that I am inclined to agree with Luban here; it is rather to suggest that the morality of acknowledgment can—and does—pull in opposite directions.

319. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 396; *infra* text accompanying

Indeed, as we have seen, he finds fault with the central conception of the lawyerly role, the old role morality, that both embodies these rules and provides their basis. This poses two related problems for Luban's system: first, whether the disagreement can be accommodated within an objective morality and, second, if it can, what the implications are for individual moral agents within the system.

With respect to the first problem, it is important to distinguish among the different reasons Luban himself finds for criticizing general rules, for some of these reasons are easier than others to accommodate within a system of common values. Sometimes the problem Luban identifies is a conceptual error, as in his criticism of the confidentiality rule in the context of bureaucratic entity clients. Here he identifies the fallacy of misplaced concreteness: a rule designed to protect individual people from the psychological trauma of self-incrimination has been extended to artificial persons that, literally if not figuratively, have no souls.<sup>320</sup> Such a problem is fairly easy to account for within his system of assumed common values.

Equally easy to account for is Luban's second basis for criticizing rules. Sometimes he thinks the rules do not, as a matter of fact, achieve the values they purport to advance. This criticism is at the root of his attack on unrestrained partisanship in litigation as the engine of truth discovery—the system simply cannot be shown to deliver the promised goods.<sup>321</sup>

There is, however, a third basis on which Luban criticizes rules, more often than not implicitly. Sometimes both the rule Luban prefers and the alternative he criticizes will have costs in terms of two sets of values that Luban himself acknowledges as values. The problem is not that the criticized rule fails to advance the values it purports to advance, but that the cost of that advance in terms of other values is, by Luban's lights, unacceptably high. In the *Lake Pleasant* case, either the parents will suffer or the client's secret will be revealed to his disgruntlement, if not greater detriment. In the perjury trilemma, candor or confidentiality or completeness of client disclosure will be sacrificed. In the context of negotiation, a lawyer cannot reveal information the other side needs for a just result without denying the client the leverage that the information affords. In the cross examination of rape victims, their privacy interests and the

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note 340; see also *infra* text accompanying note 352 (discussing Luban's reading of the ABA standards).

320. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 194-95, 228-33.

321. *Id.* at 68-74.



public's interest in encouraging the reporting of sex crimes must be balanced against the defendant's interest in a vigorous defense. At the highest level of generality, any injection of moral limits on what lawyers do for clients will come at the clients' expense.

Because this last example is central to Luban's criticism of the old role morality and in a sense subsumes the others, it warrants elaboration. Stephen Pepper has constructed a defense of the old role morality on the foundation of individual autonomy.<sup>322</sup> His basic premise is that individual human autonomy is a good, and that our society promotes that good by permitting citizens to operate without interference as to matters not forbidden by law.<sup>323</sup> The role of lawyers, in this scheme, is to advise citizens of the parameters of the law, for, in a complex culture pervaded by law, citizens unadvised by lawyers would be unable fully to exercise their autonomy in the socially defined sphere.<sup>324</sup>

We have already seen one criticism of this approach—the argument that society would be better rather than worse off if what the law cannot forbid without undue cost or intrusiveness could be barred by other means.<sup>325</sup> Here I want to examine a different criticism—the objection that Pepper's emphasis on autonomy comes at too great a cost in another fundamental social value, equality.<sup>326</sup> The rub here is that not everyone has access to a lawyer, and that, accordingly, those who do are in a position to exercise their autonomy at the expense of those who do not. Interestingly, both Luban and Pepper accept that autonomy and equality are fundamental values<sup>327</sup> and that the conflict between them, posed by unequal access to legal services, is a serious problem.<sup>328</sup> Where they differ is on which value to subordinate. The admitted impossibility of the full autonomy of all poses a choice between the full autonomy of some and the full autonomy of none; Pepper elects the former<sup>329</sup> and

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322. See Pepper, *supra* note 2.

323. *Id.* at 616-17.

324. *Id.*

325. See *supra* text accompanying notes 28-37.

326. As Isaiah Berlin put it, "[b]oth liberty and equality are among the primary goals pursued by human beings through many centuries; but total liberty for wolves is death to the lambs." BERLIN, *supra* note 260, at 12.

327. See Pepper, *supra* note 2, at 616-17; Luban, *Lysistratian Prerogative*, *supra* note 23, at 639, 642-43.

328. See Pepper, *supra* note 2, at 619; Luban, *Lysistratian Prerogative*, *supra* note 23, at 643.

329. See Pepper, *supra* note 2, at 619-21; Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 657, 667-68.

Luban, the latter.<sup>330</sup> Either might have ended his reply to the other with this observation by Isaiah Berlin:

What is clear is that values can clash. . . . They can be incompatible between cultures, or groups in the same culture, or between you and me. . . . We can discuss each other's point of view, we can try to reach common ground, but in the end what you pursue may not be reconcilable with the ends to which I find that I have dedicated my life.<sup>331</sup>

This impasse is highly instructive, for several reasons. For one thing, it is clearly a dispute about how we are to order values, not merely about how well a particular rule implements an agreed ordering of values.<sup>332</sup> Full autonomy can only be purchased at the cost of diminished equality. For another thing, it is an argument between two scholars who agree on fundamentals, at least to the extent of casting their positions in secular egalitarian humanist terms. Finally, what they argue about here is more than a single rule, more even than a very central rule like confidentiality. What is at issue here is the principle of partisanship itself, the very principle that defines the old role morality and distinguishes it from whatever we are to put in its place.

Pepper's argument thus takes us above the third tier of the fourfold root, the level of roles, and up to the fourth, and last tier, the level of ultimate values. If his argument is sound, he has derived the old role morality from one of the loftiest of values, autonomy, and justified its cost in another superlunary value, equality. From the principle of partisanship most, if not all, of the rules of the old role morality follow—subject, of course, to the caveat that in the friction-ridden sphere in which they operate, they must actually achieve the goal set for them in the heavens.

Disposing of Pepper's argument, therefore, is critical to Luban,

330. See Luban, *Lysistratian Prerogative*, *supra* note 23, at 643-45.

331. BERLIN, *supra* note 260, at 12. These irreducible conflicts leave me with little confidence in Allan Goldman's program for resolving moral disputes, in professional ethics and elsewhere, by reference to agreed principles, "the background of shared commitments and judgments." See GOLDMAN, *supra* note 11, at 15-17. The problem is not that professionals seek refuge in isolated professional moralities, *cf. id.* at 17-18, but that individual professionals differ in their ordinary moral commitments in the way that the debate between Luban and Pepper illustrates.

332. An equally accurate way of describing the conflict between Luban and Pepper is to say that they embrace different conceptions of equality. Luban, on this view, favors substantive equality; Pepper favors formal. See Ronald Dworkin, *What is Equality?*, 10 PHIL. & PUB. AFF. 185, 185-86 (1981) (distinguishing political from distributional equality).

and his critique is illuminating. After carefully identifying Pepper's subordination of equality to autonomy,<sup>333</sup> he parodies Pepper's conclusion effectively, if mercilessly, with a *reductio* that he calls "executive class citizenship."<sup>334</sup> Allowing some citizens to have lawyers committed to the partisanship of the old role morality while other citizens have no lawyers at all, Luban tells us, is like creating a special class of citizenship entitled to such perks as "dandy new tax shelters, first-refusal mineral rights in the natural wilderness, no-wait federal courts unavailable to anyone else, diplomatic passports."<sup>335</sup> We must be careful, however, to note what kind of responses parodies and *reductio*s are, and under what conditions they are effective. Rather than rebut the position they address by showing it to be irrational or erroneous, they highlight what is hoped will be unacceptable consequences under norms the parodist shares with the intended audience. Thus Luban concludes with a direct appeal to the reader to adopt, or re-affirm, Luban's ordering of values: "[W]ould you say, as I would, that *if everyone can't have executive-class citizenship then no one should?*"<sup>336</sup> It is worth noting that the emphasis is in the original; Luban is rhetorically raising his voice.

I fully agree with the point of the parody. It is hardly a great moral advance to suggest that the law's magnificent equality lies not in forbidding the rich and the poor alike to sleep under bridges,<sup>337</sup> but in permitting both classes to hire a lawyer to challenge this infringement upon their autonomy. But not everyone will agree. Parodies leave open the possibility that the proponents of the parodied position will accept the parodist's "unacceptable" consequences because they have different values or, more likely, a different ordering of the same values. This—with some unpersuasive softening of the edges<sup>338</sup>—is precisely what Pepper does.

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333. See Luban, *Lysistratian Prerogative*, *supra* note 23, at 643-44.

334. *Id.* at 644-45.

335. *Id.* at 644.

336. *Id.* at 645.

337. The parallel between Anatole France's parody and unequal access to lawyers under the old role morality has not escaped even so firm an advocate of that morality as Abe Krash. Krash, *supra* note 16, at 39.

338. Pepper says that, even if the current distribution of legal services were as unequal as Luban's "executive class citizenship" suggests, he would "continue to think that the *better* solution is to improve the distribution of legal services, not to transform lawyers into police, judges, or deceivers." Pepper, *supra* note 329, at 668. This softening of the factual predicate of inequality is unconvincing, however, in view of Simon's observation that "[t]here is no practical way of equalizing access to legal services sufficiently to preclude oppression." Simon, *Ideology*, *supra* note 12, at 50. In fact, the very administration that Luban suggested might bring us "executive class citizenship" called for, and got, substantial cuts in subsidized legal services for the poor. See WOLFRAM, *supra* note 4,

I have eschewed trying to resolve the debate between the new role morality and the old, though it bears repeating that my sympathies lie with Luban. Moreover, I have suggested that what supports the firmament of values at the apex of the fourfold root is as insubstantial, and as unnecessary, as the ether. My point here is that, at these lofty elevations, the atmosphere is rarefied indeed, and the asserted links between ultimate values and conceptions of the lawyer's role are likely to leave you breathless. For the metaethical skeptic, the problem of establishing these links is a molehill, if not a mirage. But those who seek right moral answers must live on the mountain they have made.

Even if Luban can surmount this problem, there is a second problem at a more mundane level that confronts the individual lawyer trying to live out Luban's method. Convinced though you may be of right answers to moral questions, you face a dilemma when you conclude that a particular cooperative scheme is not beneficial, whether under Luban's "reasonable and important" standard or another. Are you to accept your own assessment, or that of the community as reflected in the imprimatur of the law?

To see how this dilemma arises, consider one of Luban's own concrete examples. Suppose you are a lawyer negotiating for a client who wishes to use a great advantage in bargaining strength to gain what strikes you as an unconscionably lopsided result. After unsuccessfully remonstrating with the client, you might consider withdrawing from the case. As Luban points out, however, "[i]t will often, or even usually, be the case that the client will be damaged if the lawyer withdraws," particularly where timing is critical or where the withdrawal might raise a red flag.<sup>339</sup> Furthermore, according to Luban, "[u]nder the Code, . . . the lawyer cannot withdraw in any of these circumstances, because in all of them withdrawal would damage the client; and if the client does not grant permission to forego use of the odious tactics, the lawyer must proceed with them."<sup>340</sup>

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§ 16.7.3, at 938-39 (describing President Reagan's cuts in the National Legal Services Corporation budget and his efforts to abolish the Corporation). Perhaps Pepper disagrees with Simon over what would be an improvement in the availability of legal services sufficient to preclude oppression. If so, this disagreement simply suggests that Pepper's softening of the facts will hardly make them cushy for the poor.

339. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 396.

340. *Id.* This conclusion is based on an aggressive reading of the MODEL CODE, *supra* note 14, DR 2-110(a)(2), DR 7-101(A)(3). As Luban concedes, the Model Rules are more lenient with respect to withdrawal for reasons of conscience. See MODEL RULES, *supra* note 43, Rule 1.16 (b)(3) (permitting a lawyer to withdraw when "a client insists on pursuing an objective the lawyer considers repugnant or imprudent," even if the withdrawal will have a "material adverse effect on the interests of the client"). Even if

This negotiation rule is but a corollary of the old role morality's principle of partisanship, a principle Luban may have led you, as he has led me, to reject. But even if you are convinced that, on one or more of Luban's criteria, the old role morality, together with this and other corollaries, fails to qualify as a beneficial cooperative scheme, what are you to do about the fact that it is the law—law that defenders loudly declare to be a beneficial scheme?<sup>341</sup>

Luban recognizes that your general disagreement with a conception of the lawyer's role or with one of its component obligations, as opposed to disagreement with a rule's application in a difficult case, puts you as an individual lawyer in an uncomfortable bind. You face what Luban admits to be an unpleasant series of dilemmas.<sup>342</sup> You can leave the practice of law (or, as in Cecilia's case, the particular branch of practice), or you can submit to the authority of publicly determined role obligations.<sup>343</sup> If you stay and submit, you must either suppress your doubts and conform to the publicly sanctioned role norms or heed your doubts and challenge the norms in legally acceptable ways. You may disobey openly, in the mode of classic civil disobedience, and either be vindicated by the legal authorities or pay the legal penalty, thus showing respect for law.<sup>344</sup> Alternatively, you may disobey in secret, both treating

Luban's reading of the Code is overly aggressive, it is not implausible. If the 1969 Code does not restrict withdrawal to quite the extent Luban maintains, it certainly comes close, and the next ABA standards, or any state by adoption of amendments to existing ABA standards or a code of its own, certainly could.

Moreover, even if withdrawal was not improper under the old code, it is pretty clear that staying in and making the argument *was* proper. That, remember, was the conclusion of the court in the aortal aneurism case, *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962), discussed *supra* note 3.

341. Luban argues at length in Appendix 1 of *LAWYERS AND JUSTICE*, *supra* note 2, that the old role morality is firmly ensconced in the law governing lawyers. *See id.* at 393-97. Even if, as I have suggested elsewhere, his reading of the ABA's official codes—the Model Code of 1969 and the Model Rules of 1983—is overly aggressive, *see supra* note 340, we can assume he is right for the purpose of showing the dilemma in which his own reading of the law places him. *See Stier, supra* note 2, at 580-87 (arguing that critics of the old role morality misconceive its place in the profession's ethical standards because they misunderstand the relation of law and morality in positivist jurisprudence).

342. *See LUBAN, LAWYERS AND JUSTICE, supra* note 2, at 139.

343. *Id.* at 138.

344. *Id.* at 156. Ellmann notes that Luban does not explicitly consider an alternative to open civil disobedience: covert violation of laws with which one disagrees. *See Ellmann, supra* note 13, at 152 n.78. I believe, as Ellmann suggests, that Luban's rejection of that alternative is implicit in his notion of legal obligation—you cannot covertly violate even laws with which you disagree without being unfair to your fellows and jeopardizing your own moral integrity. *See LUBAN, LAWYERS AND JUSTICE, supra* note 2, at 47-48 (proposing that because of the connection between the lawyer's obligation to the law and respect for fellow citizens, the lawyer must offer a reason for disobeying the law). It

your law-abiding fellow citizens unfairly<sup>345</sup> and doing violence to your own conscience,<sup>346</sup> perhaps lapsing into alcoholism and other forms of personal decay.<sup>347</sup>

This is essentially the set of dilemmas the Laws of Athens posed to Socrates in the *Crito*.<sup>348</sup> Socrates had not exercised the option of expatriation, and so, according to the Laws, had subjected himself to their authority. Having failed to persuade the jury in the *Apology*<sup>349</sup> that he was innocent of violating the laws, he was bound to accept the appointed punishment. If he sought to avoid that punishment by accepting Crito's offer of aid in escape, he would be confirming the very verdict of subversion of public values that he had so vehemently, and recently, opposed. To save his life, in a word, would be to sacrifice his integrity, and thus what he had lived for.

But it will be objected that this analysis whipsaws Luban. I have argued above that the individual is not in danger of unfairness to fellows or personal moral decay in departing from collective norms; now I am trying to have it the other way. But there is no inconsistency here; Luban is welcome to abandon, with me, the notion that collective decisions are morally binding on individuals who dispute them, and with it the conclusion that individuals should, and will, feel conscience-smitten when they violate them. But until he drops that notion, he must live with its consequences.

One could further object that the Laws of Athens offered another alternative: persuade the public authorities that the law is wrong, not just wrongly applied. I have included this alternative only in its post hoc, civil disobedience form—persuade the law's agents that the law you have violated is bad, as applied generally or to your case. But what about changing the law in advance? Here Luban plays both sides of the fence. On the one hand, he admits that the option of changing the rule is not really viable from the perspective of the individual practitioner faced with a morally objectionable role obligation.<sup>350</sup> On the other hand, in his criticism of rules he often, implicitly or explicitly, calls for the rule to be changed. Thus, for example, in the negotiation problem, he calls for a change in the rules: "I suggest that rules be redrafted to allow

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is also implicit in Luban's taking the civil rights movement as the paradigm of morally legitimate disobedience. See Luban, *Mid-Course Corrections*, *supra* note 52, at 455.

345. See *supra* Subpart III.B.1.a.

346. See *supra* Subpart III.B.1.b.

347. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 138.

348. PLATO, *Crito*, *supra* note 70, at 53-65.

349. PLATO, *Apology*, in EUTHYPHRO, APOLOGY, CRITO, *supra* note 70, at 42.

350. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 138.

lawyers to forego immoral tactics or the pursuit of unjust ends without withdrawing, even if their clients insist that they use these tactics or pursue these ends."<sup>351</sup>

Luban is quite right to point out that one can view rules from either of two perspectives: The role agent's perspective, from which they are unchangeable, or the role designer or legislator's perspective, from which they are reformable.<sup>352</sup> Well and good—if you can supply a common set of values and if you are in a position to wait until the changes are made. But what is a lawyer—what are you—to do in the meantime, which is now and the foreseeable future? Luban fails to see that the fourfold root is more appropriate for role designers than for role agents, for whom changing the role is simply not a viable option.<sup>353</sup>

We are back to the painful dilemmas of the *Crito*, and here Luban waffles. Sometimes he recommends courageous disobedience to the law;<sup>354</sup> other times, deference to the different opinions of one's fellows, enshrined in law.<sup>355</sup> In the last analysis, however, it is just a matter of which horn to impale yourself on; never does he suggest breaking out of the dilemma of the *Crito*. He does suggest

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351. *Id.* at 159.

352. *Id.* at 138-39.

353. This point has not, however, been lost on Luban's critics. See, e.g., Ellmann, *supra* note 13, at 151-52 (suggesting that Luban might use his system as the basis for reforming the lawyer codes and arguing that it too frequently calls for civil disobedience under existing law); Wasserman, *supra* note 26, at 402-03 (arguing that the fourfold root is "far more appropriate for the legislator" than for the individual role agent).

Simon, like Luban, overlooks this problem when he declines to "distinguish between ethical analysis relevant to a regulatory body promulgating rules of professional conduct and analysis relevant to an individual lawyer operating within the limits of promulgated rules." Simon, *Ethical Discretion*, *supra* note 12, at 1084. Moreover, Simon also occasionally shifts to the role designer's perspective, as in his discussion of the confidentiality of client communications, and thus obscures the problems that confront the role agent. See *id.* at 1140-43.

354. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 149-50, for Luban's discussion of *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962), as a foil to the *Lake Pleasant* case; and Luban, *Partisanship*, *supra* note 62, at 1026, for his emphatic argument that the lawyer in the *Spaulding* case should have betrayed the client: "Betrayal? I suppose. Justified? You bet." See also LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 206-34 (calling for whistle-blowing in the Pinto case); *supra* note 319 (Luban's position on defending accused rapists).

355. At some risk of over-generalization, it can be said that Luban comes down more often for disobedience in *Lawyers and Justice*, and more for deference in *Mid-Course Corrections*. He does not renounce in the latter his earlier view that the dilemma posed by individual questioning of public norms is fundamental, but he nevertheless insists on deference. The escape from over-immersion in role is to come through the morality of acknowledgement. As we have already seen, however, this works only at the level of applying good rules, and it does not always work well even there.

different arguments for staying in the dilemma, however,<sup>356</sup> arguments that press him toward his most ambitious claim.

3. *Luban's Extramural Claim.*—Luban's modest intramural claim needs a theory of political obligation to make it work, to give its individual adherents a reason for deferring to collective norms they see as misguided.<sup>357</sup> Luban's ambitious intramural claim fails to meet this need. His Kantian argument could not show, on terms acceptable to both him and libertarians, either that his world of relatively more cooperative schemes was better than their world of relatively few, or that they would be unfair toward their fellows if they acted on that preference and disobeyed laws with which they disagreed. Nor did he show, in his Cecilia example, that this disobedience will come at the cost of personal moral integrity. He shows only that it produces a more individualistic character than he likes. What he needs, again, is an objective argument that such a character is bad, or more precisely, morally worse than viable alternatives. If he can show us why it is objectively bad not to defer to dubious cooperative schemes, and if we concede (as I think we must) that law is a necessary means of effecting cooperative schemes, then he will have made his case for political obligation.

There are, we have seen, two avenues to moral objectivity, the realist route and the interpretivist route. Luban relies on scholars of both schools in his intramural arguments for legal obligation. He does not expressly incorporate their extramural points into his position, and we cannot examine any of their arguments in detail or all of them even in outline. We can, however, see how a representative theorist from each school, and one on whom Luban expressly relies, runs afoul of the problems of objective ethics in the context of political obligation.

Let us begin with the realist John Finnis, whose views on the foundations of ethics we examined briefly in Part II<sup>358</sup> and on whose

356. My brand of fideism gives the opposite counsel: disobey secretly (unless the risk of detection, together with the severity of the sanction, is too great) and in good conscience. See *infra* Subpart IV.A.

357. Luban gives principles, within liberalism, for rejecting some of the more egregious laws. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 43-49 (arguing against discriminatory laws). What Luban fails to give are reasons for not rejecting more, those laws that the lawyer thinks are (merely) misguided as to accepted values, or which implement orderings of values the lawyer personally rejects. See *id.* at 43 ("I shall not stress [a beneficentiality requirement], for almost all laws are enacted to benefit someone or other, and it is likely that almost all of them succeed in doing so.").

358. See FINNIS, *supra* note 81, at 59-75 (setting forth knowledge as a basic good).



theory of political obligation Luban explicitly relies.<sup>359</sup> Finnis begins with basic and self-evident goods, apprehended directly as both basic and good by reason in a special moral mode.<sup>360</sup> He notes, however, that these basic goods may conflict, as we saw in the last section. Such conflicts suggest that it is not enough to discover objectively good goods; we also need an objectively valid means of coordinating them. And there is one such means: Reason in its special moral mode, itself one of the self-evidently basic goods, structures our pursuit of goods according to fundamental principles of practical reasonableness that are also self-evident.<sup>361</sup> This operation of self-evident and rational moral method upon self-evident basic human goods, the principles of natural law, produces rational moral directives.<sup>362</sup>

One of the most basic principles of practical reason is "the requirement of favoring and fostering the common good of one's communities."<sup>363</sup> These include one's political community,<sup>364</sup> where the notion of common good, in the sense of "general welfare" or "public interest," has its proper application.<sup>365</sup> Appealing to these self-evident principles, particularly the requirement of pursuing the common good, Finnis argues not just that a political community with relatively more collectively beneficial schemes requires coordination through a coercive authority—the factual point Luban makes about the need for law—but also that such a community is good, and better than the alternatives—the normative point Luban needs to make in order to answer libertarians and allied critics.<sup>366</sup>

But Finnis, rigorous Thomist that he is, is not content to leave matters there. He raises, and addresses in detail, the next logical question: What guarantees the insights of the practical reasonableness on which political legitimacy (and much else besides) seems to

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359. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 32 n.2; Luban, *Mid-Course Corrections*, *supra* note 52, at 455 n.86.

360. See FINNIS, *supra* note 81, at 81-90; see also *supra* text accompanying notes 90-94.

361. FINNIS, *supra* note 81, at 100-03; see also *id.* at 103-26 (listing Finnis's description of each of his nine requirements of practical reason); Stier, *supra* note 2, at 590 ("Persons of good character are disposed both to recognize and to choose that which is good or right when engaged in the process of practical reasoning.").

362. See FINNIS, *supra* note 81, at 103 ("[W]e could say that the requirements [of practical reasonableness] express the 'natural law method' of working out the (moral) 'natural law' from the first (pre-moral) 'principles of natural law.'").

363. *Id.* at 125.

364. *Id.* at 147-50.

365. *Id.* at 154-56.

366. See generally *id.* at 161-350. For Finnis's particular discussion of legal obligation, see *id.* at 297-343. As a corollary of grounding obedience to law on the objective goodness of law, Finnis outlines a solution to the problem of unjust laws. See *id.* at 351-66.

rest? The answer is God, and not just any god. It is not the aloof god of Plato and Aristotle, approachable by unredeemed human reason, but the self-revealing God of Christianity, opaque to pagan eyes:

Without some revelation more revealing than any that Plato or Aristotle may have experienced, it is impossible to have sufficient assurance that the uncaused cause of all the good things of this world (including our ability to understand them) is itself a good that one could love, personal in a way that one might imitate, a guide that one should follow, or a guarantor of anyone's practical reasonableness.<sup>367</sup>

I have followed Finnis into the heavens not to declare that they are empty, but to note how far he takes us beyond the three walls of secularism, egalitarianism, and humanism within which Luban set out to find his foundations.

It is one thing to resign oneself, with Hardy, to the harsh reality that "He who breathes All's Well to these/ Breathes no All's Well to me."<sup>368</sup> It is quite another to resign oneself to the prospect that those who breathe "Thou shalt" in His name mean it to apply not only among themselves, but also to you and me, and with the force not just of might, but also of right. One of the chief tasks of liberal thought lo, these many years, has been to deliver us from that prospect; we are entitled to be more than a little surprised to learn that liberal thought is looking in that direction not for attack, but for deliverance.<sup>369</sup>

It is possible, of course, not to follow Finnis behind the certitudes of intuition; one can simply stop there.<sup>370</sup> Alternatively, one

367. *Id.* at 398.

368. Thomas Hardy, *The Imprecipient*, in 2 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE, *supra* note 106, at 1740, 1741.

369. Cf. ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 295 (1975) (concluding with the words "Speak, God"). It is, of course, possible to ground morality on God without reference to the Christian revelation, but that approach raises the Euthyphro problem. See *supra* note 97. On the incompatibility of contemporary liberalism with appeals to religious foundations, see FISHKIN, *supra* note 78, at 153-55. See also BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10 (1980) (noting that the liberal principle of neutrality requires that "nobody has the right to vindicate political authority by asserting a privileged insight into the moral universe which is denied the rest of us"). But see KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE vii (1988) (maintaining that "citizens and officials in this liberal democracy properly rely on their religious convictions when they decide what political actions to take").

370. Not surprisingly, one standard approach of liberal political theorists, wary of the problem of deriving an "ought" from an "is," is to leave matters there. See, e.g., Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817, 820-21 (1986) (arguing that legal liberals, committed to

can take the interpretive turn. This is the approach Ronald Dworkin takes, and he nicely illustrates its problems. Rejecting traditional theories of legal obligation,<sup>371</sup> Dworkin offers a theory grounded in community and resting on two premises.<sup>372</sup> First, most of us believe that membership in certain communities creates certain moral obligations on members, even without their consent. In his words,

[m]ost people think that they have associative obligations just by belonging to groups defined by social practice, which is not necessarily a matter of choice or consent, but that they can lose these obligations if other members of the group do not extend them the benefits of belonging to the group.<sup>373</sup>

Second, political communities of the kind he recommends<sup>374</sup> are like these obligation-generating communities in the relevant ways.<sup>375</sup> From these premises, Dworkin concludes that political communities of the kind he recommends generate morally binding obligations even on members who do not consent.<sup>376</sup>

Dworkin argues at great length to show that the second premise is in fact true, that his preferred kind of political communities are like the other kinds of obligation-creating communities.<sup>377</sup> But even assuming, arguendo, that both premises are true, Dworkin's conclusion does not follow. What he has proved is not that his recommended political communities generate binding moral obligations, but that "we" or "most people" think they do. To prove his point, Dworkin must add an additional premise—that what most people think is obligatory really is obligatory, binding on those who disagree.

One way to prove that premise would be to show that it is right

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the separation of facts and values, rest their arguments for the morality of law on "intuitively grasped and noncontingent moral truths").

371. See DWORKIN, *supra* note 84, at 190-95 (rejecting tacit consent, the duty to be just, and notions of fair play as explanations for the moral authority of law).

372. See *id.* at 195-216.

373. *Id.* at 196.

374. The kind of political community Dworkin recommends is one in which the laws, whether made by judges or legislators, have what he calls integrity. Very briefly, laws have integrity if they can be shown to fit into a coherent interpretation of the legal system as a whole. *Id.* at 165-66.

375. *Id.* at 206-15.

376. See *id.* at 214 ("A community of principle[, one that is based on integrity,] . . . can claim the authority of a genuine associative community and can therefore claim moral legitimacy—that its collective decisions are matters of obligation and not bare power—in the name of fraternity.").

377. See *id.* at 206-15.

by the sort of transcendental standard the realists assert, a prospect Dworkin mocks.<sup>378</sup> Another way, bordering on fideism, would be to show that all members of the relevant political communities accept the premise and thus by departing from what most members think moral, dissenters depart from a standard they themselves accept. But such a claim seems improbable in any existing political community, and Dworkin never asserts it. Instead he argues that trying to find some kind of objectivity behind his original major premise is pointless.<sup>379</sup> If that is so, however,<sup>380</sup> then the critical question for Dworkin's theory of legal obligation remains: Why should you as a dissenter consider yourself bound by the opinion of other members of a community you did not voluntarily join?

The positions of Finnis and Dworkin, while not exhaustive of the possibilities, are sufficient to show the problems that are likely to arise in other attempts to take either of the two paths of objectivist ethics, the realist or the interpretivist. Either they will, like the realist Finnis, rely on insights inaccessible to some of us, or they will, like the interpretivist Dworkin, elevate the standards of particular human communities to normative status. Rather than examine ways to surmount these problems and build a theory of political obligation, I shall take a different course.

#### IV. IN DEFENSE OF A FIDEIST LAWYERS' ETHICS

Let us now take stock of where we are. Looking back, we have not demolished the twin foundations, objective ethics and political obligation, on which Luban and Simon erect their theories of legal ethics. But we have seen some of the problems with these foundations, both in themselves<sup>381</sup> and as the basis for a system of legal ethics.<sup>382</sup> Seeing those problems, however, is hardly a sufficient ground for rejecting Luban's and Simon's systems. In addition, we must see that a more satisfactory system can be built upon alternative, skeptical premises.

To some extent, we began to clear the ground for that alternative in Part III, where I showed that fideism does not fall prey to the

378. See *id.* at 80-81; see also RONALD DWORKIN, A MATTER OF PRINCIPLE 172-73 (1985) (discussing the "incomprehensible metaphors" of philosophers who believe that propositions such as the injustice of slavery really are "out there").

379. See DWORKIN, *supra* note 84, at 80-85; DWORKIN, *supra* note 378, at 171-77.

380. And it is not. See Moore, *supra* note 78, at 952-57 (suggesting that Dworkin's arguments on this point are paradoxical, if not self-contradictory).

381. See *supra* Part II.

382. See *supra* Part III.

problems Luban claimed to find with any liberal lawyers' ethic other than his own. Now we must turn to two great problems peculiar to skepticism, problems that Luban and Simon implicitly seek to avoid in the very adoption of their objectivist and legitimist premises. First, when, if ever, could we accept the state's coercion of dissidents to participate in a beneficial cooperative scheme? And second, by what, if neither law nor public morality, will individuals who follow the fideist course be restrained? I will address these questions respectively as the problem of political illegitimacy and the problem of ethical skepticism.

I think these problems are at the root of why Luban and Simon have turned from a more individualist lawyers' ethic to their present position of deference to public norms.<sup>383</sup> The problem is not so much that "no one after drinking old wine desires new," or that each finds that "the old is good."<sup>384</sup> They have tasted the new wine of individual moral responsibility, and they know that in important ways it is better than the old. But it is heady stuff, and it threatens to burst the old wineskins of political legitimacy and objective morality, and with them the comfortable confines of a lawyerly morality of rules and exceptions. It is this loss, not the loss of the old wine, that they fear, for they themselves have rejected the old wine of absolute deference to role obligation. And yet, to preserve the old wineskins, they would dilute the new wine with the old, producing a *prima facie* obligation to obey collective norms. Before we accept the admixture of the old—and before we drink too deeply of the new—we must see what will be left, what will contain the new wine if the old wineskins are burst.

#### A. *Problems with Political Illegitimacy*

Why do liberals like Luban and Simon insist on political legitimacy? The reason, perhaps more psychological than logical, is that they fear the alternatives, which they take to be libertarianism and anarchism.<sup>385</sup> At the root of this fear is the mistaken notion that acceptable coercion on the part of the collective and morally obliga-

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383. See Simon, *Ethical Discretion*, *supra* note 12, at 1084 n.1 ("I now think that I was mistaken to argue in an earlier article [Simon, *Ideology*, *supra* note 12, at 130-44] that the critique of conventional advocacy presented there required abandonment of the lawyer's professional role."); Luban, *Mid-Course Corrections*, *supra* note 52, at 433 ("This [later, and more role-deferential] way of understanding the fourfold root avoids the unpleasant result of the first, consequentialist interpretation, namely the extreme attenuation of professional duty that it implies.").

384. Luke 5:36-39 (Revised Standard).

385. Luban is quite explicit about this in *Mid-Course Corrections*, *supra* note 52, at 453-

tory obedience on the part of the individual stand or fall together. In Dworkin's words, "no general policy of upholding the law with steel could be justified if the law were not, in general, a source of genuine obligations."<sup>386</sup> Luban feels morally comfortable with the collective's coercion of dissidents only if he can be convinced that they are morally obliged to obey. Thus if his way of thinking fails, if we cannot point to some inclusive set of moral norms under which citizens are morally bound to obey laws with which they disagree, coercion is drastically curtailed, if not precluded. We are left with libertarianism, which tightly restricts collective coercion, or with anarchism, which rejects it entirely. Luban, committed as he is to a wider range of collectively beneficial schemes than either libertarianism or anarchism is likely to produce, recoils from this loss of political community and casts about for what he takes to be its precondition, an obligation on the part of citizens to obey laws that putatively provide collective benefits.

Such an obligation is not, however, a necessary precondition of Luban's wider range of collectively beneficial schemes. On the assumptions of metaethical skepticism one can accept governmental coercion without accepting citizens' reciprocal moral obligation to obey.<sup>387</sup> This is because skepticism denies a critical premise Luban implicitly affirms—that individuals have a *prima facie* right to do as they like—and a corollary of that principle—that compelling them to do otherwise requires a trumping of that right with a moral duty to obey.<sup>388</sup> On moral skeptical grounds, by contrast, the libertarian and anarchist *quo warranto* is a two-edged sword; to their question, "By what right do you coerce me?" the skeptic replies, "By what right do you claim to resist?" The peculiarity of the legitimists' predicament is that they accept without question the presumptive right to resist and yet feel embarrassed if they cannot find a right to coerce.<sup>389</sup>

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62. See also Stick, *supra* note 181, at 394 (suggesting affinity between moral skepticism and libertarianism).

386. DWORKIN, *supra* note 84, at 191.

387. Cf. WOLFF, *supra* note 283, at 79 (noting that even philosophical anarchists—those who reject the possibility of legitimate coercion—can acknowledge the desirability of schemes requiring the coordination of large groups of people).

388. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* ix (1974) ("Individuals have rights, and there are things no person or group can do to them (without violating their rights)"). In suggesting that Nozick thus assumes a critical conclusion, I am following Leff. See Leff, *supra* note 77, at 1240-41. The fact that Nozick has subsequently found his libertarian conclusions "seriously inadequate" does not mean that those conclusions did not rest on the premise of individual rights. NOZICK, *supra* note 250, at 17.

389. This is an error akin to the illogical linking of skepticism with relativism. Just as

Where, then, does this skeptical divorce of coercion from morally obligatory obedience leave us, if not with anarchism or libertarianism? Our view of law from the position of both role agent and role designer or legislator would dramatically change. As rulemakers, or as members of a political majority, we would have to accept that coercing dissidents is sometimes the lesser evil. We must either coerce them against their wills or do without beneficial cooperative schemes; sometimes we must swallow hard and choose the latter.<sup>390</sup> (And if we could be convinced, say, that a sales tax on luxury boats and cars was financing head start programs without collateral harm to the poor, at least a few of us would not swallow very hard.<sup>391</sup>) We recognize, however, that dissidents need not feel morally compelled to obey those of our laws that strike them as wrong-headed or evil. Our morals do not apply to them by their own choice; we for our part know our values are not universal.

This, in turn, should alter our attitude toward dissidents. If the morality behind our law is not universal, we can no longer think them wrong or evil merely because they disobey the law. Rather, we will have to assess their disobedience on its own merits, looking, for example, to its motivation and its impact. In particular, we can respect them under our own standards, if they act with what counts for us as personal integrity. (If Freedman's Robin Hood is not to your liking, think instead of Luban's Cecilia.) This would hold equally true for dissidents who are fellow secular egalitarian humanists and for others. The chief difference would be that we share a wider range of background assumptions with the former and are thus less likely to find ourselves in substantive disagreement.

Parallel changes would occur in our own posture as subjects of the law, particularly when we face laws with which we ourselves disagree.<sup>392</sup> With the removal of the moral *prima facie* case for obedi-

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it is wrong to deduce, from the absence of moral absolutes, that anything is morally permissible, so it is wrong to deduce, from the premise that obedience is not morally obligatory, that collective coercion is morally forbidden. Both deductions assume a mid-air position from which toleration is pronounced right or good, a midair position which, on skeptical premises, does not exist.

390. Cf. WOLFF, *supra* note 283, at 81-82 (projecting an affluent society free of state coercion on extremely optimistic—one might fairly say Utopian—economic and technological assumptions).

391. Compare RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (condemning progressive taxation, transfer payments, and other Progressive and New Deal programs on libertarian grounds) with BERLIN, *supra* note 260, at 12 (arguing that liberty may have to give way at times to make room for various social welfare programs).

392. Here my position is quite close to that of the philosophical anarchists. See

ence, conscientious dissidence should come at substantially less cost. And, these costs should not be too heavily discounted, for they are often paid in the hard currency of shattered lives, including, as Luban himself makes ominous allusion, the size of dissidents' liquor bills.<sup>393</sup> On illegitimet premises, to decline to take your punishment or to refuse to come out and fight (with the customary "like a man" stated or implied) is not to be a coward or a crank—or at least not by any standards other than those of the taunter.

This is not a particularly radical departure from our current moral practice. We already celebrate, rather than execrate, the Minutemen who returned ball for ball, not from the tidy formations of conventional warfare, but "from behind each fence and farm-yard wall."<sup>394</sup> And, when the prospect of prevailing is particularly low, as it was for Spanish Jews in the Inquisition, we do not even require a formal declaration of independence.<sup>395</sup>

If the illegitimet position removes the Hobson's choice between open disobedience and bad conscience, its alternative is not altogether easy. On illegitimet premises, it is no moral solace to do what the law requires, if you find it objectionable under your own system of values (except, of course, to the extent those values include deferring to the collective will in the case in question). On the other hand, the illegitimet position does not free you from the duty of open opposition only to deliver you to a duty of invariable private disobedience. Prudential concerns may certainly come into play, in particular the likely cost to you and others of your getting caught. Obeying will sometimes be justified by the excessive cost of resisting, even if one's conscience cannot be entirely clear in such cases.<sup>396</sup>

To summarize, it is possible to have acceptable collective coer-

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WOLFF, *supra* note 283, at 71 (describing how anarchists "treat *all* governments as nonlegitimate bodies whose commands must be judged and evaluated in each instance before they are obeyed").

393. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 138.

394. HENRY WADSWORTH LONGFELLOW, *Paul Revere's Ride*, in *FAVORITE POEMS OF HENRY WADSWORTH LONGFELLOW* 34 (1947).

395. Some cultures go further in this direction than ours, as evidenced by the Shi'a Muslim practice of *taqiya*, which involves concealment of one's private religious views, by dissimulation if necessary. EDWARD RICE, *CAPTAIN SIR RICHARD FRANCIS BURTON* 2, 97 (1990).

396. See GOLDMAN, *supra* note 11, at 140 (giving an example of a situation in which a lawyer's knowingly submitting false documents to a court is "a morally praiseworthy act," but one that the lawyer may justifiably forego rather than risk his or her career); Stier, *supra* note 2, at 603 ("Such behavior may be desirable, but moral courage is something only the self-righteous demand of us at all times.").



cion on illegitimet premises, though acceptable within a coherent fideist morality, not in terms of an objective common morality. There are, however, two troubling aspects of the illegitimet position. These aspects correspond to the two perspectives from which we have already viewed the illegitimet position—that of the individual facing coercion and that of the collective facing conscientious, but secret, disobedience.

From the perspective of the individual, the illegitimet position raises the horrifying Hobbesian prospect that government has no moral limits. That, so far as it goes, is true. But it does not follow, as it does for Hobbes, that anything the government does is morally justified as long as order is maintained, or that individual liberty is necessarily traded at a discount. The collective can value individual freedom as well as cooperative schemes; indeed, a society that respects individual freedom can itself be seen as a great collective benefit. Moreover, the system can also insist on the rule of law, though as a matter of preference or prudence rather than absolute moral necessity. You can appeal to the system's own values, even if they are not yours, and even if they are not in the order of the cosmos. The fact that they are not in the order of the cosmos may, indeed, be an advantage. Counterbalancing the fact that no coercion is morally forbidden is the fact that none is morally justified;<sup>397</sup> those who coerce you have no excuse, no answer but to take responsibility. There are no cosmic shoulders to which they can legitimately shift it.

From the collective's side, there is the problem of disobedience. Here we return to a problem we touched upon earlier: what happens if we universalize the maxim that you obey only the laws with which you agree? We saw above that, even if the result is a libertarian world, if we are to answer the libertarians within Kant's ethical framework, we must still show that a world with relatively more collectively beneficial schemes is preferable. Having despaired of that answer in this Part, and having taken up our preferred world as a pure preference without unassailable moral foundations, we now face the practical consequences themselves. These come in the form of a more and a less drastic concern.

The more drastic concern is that, by acting on illegitimet principles, you will destroy the law, reducing your polity to the status of Belfast, if not Beirut. This echoes one of the concerns that the Laws of Athens raised in the *Crito*, a concern that need not detain us long.

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397. See Singer, *supra* note 47, at 54.

Luban, along with a host of others, dismisses it as dubious.<sup>398</sup> What Beirut and Belfast lack is not a respect for law, but a respect for life. And respect for the latter does not invariably follow from a respect for the former, as the fastidious judiciary of the Third Reich made clear.<sup>399</sup> Respect for the law, of course, neither caused nor precluded the Nazis' legalized atrocities. But, if the *Crito* is to be credited, respect for the law did cost the life of Socrates.

The less drastic, and more plausible, concern with the illegitimist position is not that the legal order will totally collapse, but that, in the language of the economists, its maintenance costs will be marginally higher. Enforcement costs are lower in a world where conscientious folk obey laws reflexively rather than by calculation, moral or otherwise. In either world, Holmes's amoral bad men will obey only by calculation, so they do not weigh significantly in the comparison. The critical difference is what the conscientious will do under the two alternatives. In a system where their obedience to law is reflexive, their obedience adds nothing to the collective's enforcement costs after an initial investment in bringing them around to a deferential position. They obey as a matter of conscience, perhaps even habit, and thus public enforcement mechanisms are not needed to deter them. By contrast, in a system where the conscientious obey only those laws with which they agree, enforcement resources must be deployed to keep them in line, just as they must be for Holmes's bad men. Though their motives may differ, the outward effect on enforcers is the same: obedience from either class will come only at the public cost of a credible threat that sanctions will be visited upon violators.

Faced with this addition to the pool of potential law violators, a strict consequentialist would be tempted toward the following course: persuade the conscientious to obey reflexively, even if the only justification is lowered enforcement costs. But the gain in lower administrative costs seems to me unwarranted by the price of obedience. It is one thing to be told that the legal order will collapse, if you violate laws with which you disagree; it is quite another to be told that your disobedience will merely make it a bit more

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398. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 36; see also Mackie, *supra* note 210, at 147 (summarizing and defending similar doubts of Raz and Woollsey). One might also argue that what is lacking among members of these societies is not just respect, but love. For a discussion of fears of building political systems on love rather than respect, see *infra* text accompanying notes 450-452.

399. See generally Ingo Müller, *Hitler's Justice* (Deborah L. Schneider trans., 1991) (detailing the use of the legal system to perpetrate atrocities).

costly for the law's proponents to have it their way.<sup>400</sup> The legal order, if not civilization itself, already comes at a fairly high cost in individual discontentment, and I see no reason to inflate its sticker price with an additional surcharge.<sup>401</sup>

A final point in favor of the illegitimetist position, and for some perhaps the most compelling, is this: It best fits both our practice, the way we actually deal with the issue of collective coercion, and that practice, in turn, reflects our fundamental commitments to social order. The one thing any polity, including ours, cannot do is suspend coercion until it is justified to everyone's satisfaction. We will not suspend the enforcement of collectively beneficial schemes until we can show coercion to be consistent with either the moral order of the cosmos or a set of beliefs to which everyone in our polity subscribes. We will not let Nietzsche's blond beasts run rife, on any argument anyone might make.<sup>402</sup>

### B. *Problems with Ethical Skepticism*

Ethical skepticism raises two basic sets of problems relevant to our purposes. The first set comprises problems with abandoning

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400. This may actually be an appealing, rather than an off-putting, prospect. If Prohibition is any indication, many of us might think ourselves better off if more laws were to collapse under the weight of their enforcement costs. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 36 (discussing "evil, unfair, or grossly stupid laws"). Disobedience, in fact, might work to place a kind of Pigouvian tax on the overproduction of marginally popular laws. The tax might even be roughly proportional to the law's unpopularity: the less popular the law, the more widespread the disobedience, and hence the more costly the enforcement. The proponents of such laws can, of course, externalize these costs through the tax system to a significant extent, but that itself may come back to haunt them. Indeed, it seems more likely that voters will be aroused by the cumulative effect of enforcement costs than by the direct effects of any particular special interest legislation.

401. The degree of deference in such a system could, however, be set significantly lower than the amount of deference Luban and Simon suggest. See Mackie, *supra* note 210, at 151-57 (calling for the invention of a *prima facie* duty to obey the law as a means of reducing enforcement costs and noting that this duty could be overruled in particular cases).

402. This is not to say that we should disregard Nietzsche's argument that we insist on checking them out of spite or, to use his term, *ressentiment*. See NIETZSCHE, *supra* note 300, at 360. Though we cannot rebut that charge, we can answer it with the observation that, if it is true, we have fallen short of our own standard, which is to do the right thing for the right reason. Even if we have not yet attained that goal, neither has Nietzsche shown that it is unattainable. As Philippa Foot has remarked: "[I]f Nietzsche extends the range of experience in which the standard of honesty about motives applies, moralists should not take this amiss." Philippa Foot, *Nietzsche's Immoralism*, N.Y. REV. BOOKS, June 13, 1991, at 18, 22. For a suggestion that it is attainable, consistent with Nietzsche's own values, see BERTRAND RUSSELL, *HISTORY OF WESTERN PHILOSOPHY* 799-800 (1946) (dialogue between Buddha and Nietzsche).

ethical objectivity. The solution that I recommend to those problems, fideist community, in turn presents the second set of problems. I will address both sets of problems from a position of secular egalitarian humanism, though I will borrow frequently from the vocabulary of western theology.<sup>403</sup>

1. *Problems with Abandoning Ethical Objectivity.*—The practical consequences of abandoning ethical objectivity have long bedeviled those who follow this course.<sup>404</sup> These problems, sometimes raised by skeptics themselves, sometimes by their opponents, fall under two main headings: Harms that skepticism will inflict on its adherents and harms that skeptics will inflict upon others. These standard objections recur in the context of legal ethics, with a telling degree of emotion. When the focus is on the social effects of skepticism, the emotion is frequently horror, abhorrence, and outrage; when the focus shifts to the effects on skeptics themselves, the emotion is quite often sympathy, or even pity. But the two responses, different though they are, have a deep common root—extreme fear of the practical consequences of loosing morality from its ancient moorings in the mind of God, the order of the cosmos, or the mores of a particular culture.

Worries of the first sort, those for the souls of the skeptics themselves, inform Simon's effort to base his system on law rather than morality. Recourse to any form of morality, he argues, leaves the opponent of the old role morality practically disadvantaged and psychologically alone. These problems are *a fortiori* compounded, as we have seen, for skeptics, who make no claims for the objectivity of their moral positions.<sup>405</sup> Thus, for example, Michael Moore, whom

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403. In assuming that theological analogies usefully illuminate political and ethical issues, I am following Luban, who follows Levinson. See Luban, *Difference Made Legal*, *supra* note 71, at 2157-58 (citing SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988)); see also THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 59-71 (1935) ("An Analogy between Law and Theology"). The analogies are likely to be enlightening, it seems to me, if only because the language of theology addresses the same human condition in an older and richer vocabulary. In this sense, theological language is now to modern political and ethical language what Latin once was to the medieval languages of Europe. Of course, there is a risk that, to an increasingly large audience, theological language is today what Latin is today—dead. See JOHN A.T. ROBINSON, *HONEST TO GOD* 41-44 (1963).

404. See CARL L. BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH CENTURY PHILOSOPHERS* 80-81 (1932) (discussing philosophers criticized by contemporary orthodox religious opponents for destroying the foundations of morality); PURCELL, *supra* note 125, at 159-78 (discussing a similar criticism leveled at the legal realists).

405. See *supra* text accompanying note 206.

we encountered earlier as a proponent of moral realism, maintains that

[t]he psychological consequence of this [abandonment of claims to ethical objectivity] for the skeptic is to devalue his own values. Even those things that he most cherishes he will regard on a par with his taste, e.g., for watermelons: a purely subjective, arbitrary preference. He will think that the difference between preferences regarding watermelons and preferences regarding concentration camps will only be one of relative strength.<sup>406</sup>

Some suggest that this makes skeptics supporters of the status quo by default,<sup>407</sup> which, for lawyers, means the unquestioning acceptance of client ends.<sup>408</sup> Others go so far as to suggest that, faced with the groundlessness of their moral positions, skeptics are at risk of sliding downward into moral indifference and personal decay.<sup>409</sup>

But skeptics do not just abandon our common moral foundations; they threaten to subvert them. This leads to the second problem, and a less sympathetic tone of criticism. The suspicion seems to be that hidden in the dark attic of every skeptic is a picture of Dorian Gray. In a somewhat different context, Luban illuminates the lurid details in portraying "the Bohemian, the noble savage, Mr. Natural, the man or woman beyond roles."<sup>410</sup> The tone, perhaps

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406. Moore, *Moral Reality*, *supra* note 81, at 1063-64. Among others who worry over distinguishing morality from mere taste, the preference (in terms of examples, at least) runs strongly in favor of ice cream over watermelons. See DWORKIN, *supra* note 378, at 170; GREENAWALT, *supra* note 200, at 27; ETHICAL ISSUES IN PROFESSIONAL LIFE 14 (Joan C. Callahan ed., 1988) [hereinafter ETHICAL ISSUES]; Hanna Pitkin, *A Comment on Professor Waldron*, 77 CAL. L. REV. 591, 594 (1989); Simon, *Ethical Discretion*, *supra* note 12, at 1120. Until recently only two flavors, chocolate and vanilla, have been offered, but Dworkin is now offering rum raisin in *Law's Empire*. See DWORKIN, *supra* note 84, at 81.

407. See UNGER, *supra* note 88, at 12; see also Stick, *supra* note 181, at 394 (arguing that "the prime liberal value of tolerance arises from a skepticism about shared community standards regarding religious and moral values"); West, *supra* note 81, at 1491-99 (noting the serious, but not unavoidable, tendency of nonobjectivist theories of value to slide into "quietism").

408. Deborah Rhode has noted, and tried to rebut, the argument that moral skepticism plays into the hands of the old role morality by giving the absence of moral absolutes as an excuse for deferring to the wishes of clients. See Rhode, *supra* note 15, at 617, 620-23.

409. See Reed E. Loder, *Moral Skepticism and Lawyers*, 1990 UTAH L. REV. 47, 56-57. Moore does not go that far, but he suggests that "[i]f nihilism is not the consequence of skepticism, neither is the kind of passionate commitment to one's ideals [that is] possible only if one believes that they are right." Moore, *Moral Reality*, *supra* note 81, at 1064; see also Cornell, *supra* note 103, at 312-13 (moral skepticism tends to produce a paralyzing sense of purposelessness).

410. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 115.

even more than the content, bespeaks the depth of the fear. What one of the more skeptical of the legal realists noted in 1933 is equally true today: "belief that such common decency and scrupulousness as are left would disappear with *right* and *ought* is still widespread and powerful."<sup>411</sup>

And even if the skeptics themselves are well-meaning and well-behaved, what defense does their philosophy leave us against those who are neither? On that issue the level of anxiety runs especially high, and the tone of criticism comes closest to paranoia. Critics of legal realism invoked the specter of Nazism and Stalinism, arguing that such evils could be resisted only from a moral fortress founded upon objective ethics, a foundation that skeptical legal realists were sapping.<sup>412</sup> Unilateral moral disarmament against the Nazis is still among the favorite bogeys of skepticism's critics; Moore's watermelons-or-Auschwitz dilemma is a case in point.<sup>413</sup>

The answers to these objections to skepticism lie in the concept of fideist community. To see why this is so, the first point to note is that the fear of skepticism's degenerating into the Beatnikism Luban parodies is akin to what we identified earlier as the logical mistake of believing that skepticism leads inevitably to nihilism. Just as it is

411. Walter Nelles, Book Review, 33 COLUM. L. REV. 763, 766-67 (1933) (reviewing FELIX S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* (1933)); see also WILLIAMS, *supra* note 81, at 168-69 ("One reason why conservatives and traditionalists attack reflection is that they fear the uncertainty that seems to follow from it, the situation in which the best lack all conviction."). The tone tends to be even harsher toward those skeptics who are teachers; the perceived risk here is that they will drag their students down with them into the black hole of cynicism. Compare Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) ("Teaching cynicism may, and perhaps probably does, result in the learning of the skills of corruption: bribery and intimidation.") with Anthony T. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 966 (1981) (distinguishing "skepticism about particular truth claims" from "cynical carelessness about the effort to generate such propositions and to establish their validity," even when the former leads one, as it did in the case of Socrates, "to reject every account of what the truth is"). The cynics Carrington fears, it is worth noting, are explicitly those who do not believe "that legal principles actually influence the exercise of power," a belief that metaethical skeptics can maintain quite comfortably. Carrington, *supra*, at 227.

412. PURCELL, *supra* note 125, at 161-62, 178.

413. Moore, *Moral Reality*, *supra* note 81, at 1064; see also Heidi M. Hurd, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 S. CAL. L. REV. 1417, 1466-71 (1988) (stating that the "relativist thus tacitly accepts perpetuation of barbarism, chauvinism, sadism, and so forth by arguing both that such practices are relative to a group's beliefs and thus cannot be externally criticized, and that such practices are internally consistent and thus cannot be internally criticized"); FISHKIN, *supra* note 78, at 140-49 (arguing that metaethical skepticism poses its adherents with the dilemma of arbitrarily imposing their arbitrary views on others or lapsing into a relativism that cannot condemn the Nazis); Rhode, *supra* note 15, at 622 n.114 (citing the use of the Nazi example against moral skepticism).

possible that, faced with the absence of external values, one will decline to embrace any value, so it is possible that, faced with the fideist possibility of choosing one's own values, one will choose to be committed, as a limiting case, to noncommitment, to radical contingency. That this avenue is open has long been recognized; it is the way of the Underground Man<sup>414</sup> if not of Rameau's nephew.<sup>415</sup> And there is no denying either that moral skepticism opens this path, or that, on skeptical premises, there is no moral high ground, no "mid-air position," from which to condemn it. Nevertheless, to say that skepticism opens the possibility (or, if you prefer, poses the threat) of such a life is not to say that it either requires such a life or precludes others. The contrary, on both counts, is the case. The Christ, the Prophet, and the Buddha (to name but three) also beckon.<sup>416</sup>

Commitment to the way of the Underground Man, to following the immediate whims of the id in all things, may logically and practically preclude community with others, but that is hardly true of other forms of commitment. You can have communion with those who share your creed, who are committed to the things to which you are committed. These may be as mundane as hobbies and pastimes or as significant as theological positions, political causes, and scholarly schools. And in any of these areas, the common commitment may be to matters of process as well as, or perhaps instead of, substance—commitments to such things as good sportsmanship and fair play, religious toleration, political freedom, and scholarly objectivity. Transcending but potentially informing all of these kinds and levels of common commitment, one can simply be committed to another as a friend, as someone with whom one shares mutual respect and concern.

The personal and ideological commitment that fideist communities at once rest upon and foster is, in turn, the answer to two other objections to skepticism. It is true, on skeptical premises, that one's moral commitments are in a sense no more firmly grounded in objective and external reality than one's preference for chocolate over vanilla or Bach over Beat. But an Elvis fan club is not a fideist

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414. See Dostoevsky, *supra* note 250, at 52.

415. See DENIS DIDEROT, *RAMEAU'S NEPHEW AND OTHER WORKS* (Jacques Barzun & Ralph H. Bowen trans., 1975).

416. See generally BARNES, *supra* note 110, at 3-28, 50 (1967) (analyzing the position of the Underground Man in detail, and concluding that "those who hold that the arbitrary caprice of the Underground Man is the natural corollary of existentialist freedom are wrong"); DE BEAUVOIR, *supra* note 104, at 16 (arguing that life of pure contingency is possible, but not necessary).

moral community. The difference between the two is not what they rest on, but the level at which their members hold their objects. Your moral commitments have to do with how you orient yourself in the world, with what you think really matters, with what you are fundamentally committed to—in a word, with what you *are*. And in this sense, the moral approaches, and perhaps subsumes, the religious<sup>417</sup> and even the metaphysical.<sup>418</sup> In this sense, the fideist's moral commitments are hardly mistakable for taste in melons.

At the margin, the values one lives for become what one dies for, a point the skeptic Oliver Wendell Holmes emphasized before the advent of the Nazis.<sup>419</sup> This (to answer melodrama with melodrama) is the reply to those who say that moral skepticism leaves no answer to the Nazis: It leaves the only answer they will understand.<sup>420</sup> As Singer points out: "What protects us against Nazism is not the belief that reason can prove it wrong. What protects us is outrage."<sup>421</sup>

Beyond that, the very groundlessness of fideism may operate as a check in the realm of personal morality in the same way that illegitimacy operates as a check in the political sphere. Over against both Luban's beatniks and all those whose morality claims to be really right, fideists face an awesome ambiguity. They are ultimately responsible for not only what they will live for or even what they will die for, but also what they must sometimes kill for, a responsibility that cannot be laid anywhere else. They may, of course, discuss it with their friends, which itself is an important check on individual idiosyncrasy, but they are ultimately responsible for whom they take as friends. As Sartre has shown, the moral advice you get depends on whom you ask, and whether you take it is up to you.<sup>422</sup>

417. See PAUL TILLICH, *THE SHAKING OF THE FOUNDATIONS* 153-63 (1949); ROBINSON, *supra* note 403, at 46-47; cf. Simon, *supra* note 182, at 506 ("all normative questions are fundamentally religious").

418. See TILLICH, *supra* note 115, at 1-31 (identifying courage as fundamental to ontology as well as ethics in Western philosophy). But cf. BARNES, *supra* note 110, at 379-99 (criticizing Tillich and other "new theologians" in their use of existentialist categories).

419. See Holmes, *supra* note 81, at 41, 44.

420. See ACKERMAN, *supra* note 369, at 17 (1980) (stating that those who "celebrat[e] the power of the powerful to transcend all talk of good and evil . . . surely will understand me when I say that I'm willing to fight for my rival understanding of the world").

421. Singer, *supra* note 47, at 55.

422. See SARTRE, *supra* note 106, at 32-33, 91. As James Russell Lowell has said:

Ef you take a sword an' dror it,  
An' go stick a feller thru,  
Guv'ment aint to answer for it,  
God'll send the bill to you.



There is reason indeed to worry lest we become clods torn asunder from our fellows and washed away in a maelstrom of solipsism. But it is wrong to think that the only alternative is being locked in a Gondwanaland of globally recognized values. We instead may be islands in an archipelago of friends, not separated by riptides of self-assertion but united by a pacific sea of mutual dialogue and reciprocal admonition.<sup>423</sup>

2. *Problems with Embracing Fideist Community.*—I have invoked the notion of fideist community to address the problems of ethical skepticism. But the very notion of fideist community itself is subject to criticisms. These are essentially two: That it is no different from the community Luban and Simon prescribe, and that, if it is a different kind of community, it is one in which no one would want to live.

To take the former criticism first, there are, to be sure, notable similarities between the fideist ethics I describe and the normative systems of Luban, Simon, and other interpretivists. For one thing, Luban's brand of interpretivism, like interpretivism generally, clearly rejects the realists' claims of a special realm of external moral values. As Luban aptly puts it, "we can value anything from God's Word to Garbo's smile, and it is a philosophical mirage to believe that the fact that we value them transforms them into things of a special class that can be characterized in a noncircular or nontrivial way."<sup>424</sup> And we not only agree on what values are not; we are also relatively close to agreement on what they are. In Luban's words again: "Values . . . are those reasons [for acting] with which the agent most closely identifies—those that form the core of his personality, that make him who he is."<sup>425</sup> Finally, because we agree that values are reasons, Luban and I also agree that values can be discussed, even disputed, within the community of those who share them.

In unpacking this last point, however, we part company. The sense in which Luban thinks that values are reasons gives a conception of ethics, and ethical community, that is significantly different

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James Russell Lowell, *The Biglow Papers*, in *THE COMPLETE POETICAL WORKS OF JAMES RUSSELL LOWELL* 182 (Horace E. Scudder ed., 1897).

423. Compare Luban's insistence on Donne's dictum that "no man is an island," in Luban, *Mid-Course Corrections*, *supra* note 52, at 462.

424. David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 469 [hereinafter Luban, *Paternalism*]; see also Luban, *Epistemology*, *supra* note 112, at 652 (rejecting "foundationalist pre-occupations").

425. Luban, *Paternalism*, *supra* note 424, at 470.

from mine in both theory and practice. These differences become clear in the following passage:

A value system, therefore, has two aspects. On the one hand, values are reasons, and thus intersubjective and open to criticism and public assessment. On the other hand, values are definitive of the person who holds them. Both aspects are crucial. Because of the former aspect, we feel entitled to judge a person as having *wrong* values, *inadequate* values, *irrational* values, and so on. Because of the latter aspect, we nevertheless sense that attempting to change a person's values by main force, or to override them, directly assaults the integrity of his or her personality.<sup>426</sup>

Between these two aspects we see in embryo the tension between individual moral responsibility and obedience to collective norms that we encountered fully fledged in Luban's system of legal ethics. I want to focus here on Luban's notion of those norms: How are we to understand "*wrong*," "*inadequate*," and "*irrational*" as applied to values?

We must first understand a point made by J.L. Mackie: "Subjective agreement would give intersubjective values, but intersubjectivity is not objectivity."<sup>427</sup> Luban has, in fact, rejected objectivity in the sense that Mackie and I use the term, the realists' sense. We must, then, understand the meaning of "*wrong*," "*inadequate*," and "*irrational*" in the context of an ethical community defined by certain values, values that are intersubjective because they are held by the members of that community. If you are a member of that community, fellow members can denounce your values as deviant and, conversely, you can defend your values, all under community standards.<sup>428</sup>

But the same could be said of the fideist community I recommend. How, then, does that community differ from the moral community of the interpretivists? The critical difference is how you become a member of the community, and thus how its norms become applicable to you. In the fideist moral community, membership is voluntary. You are in the community, and subject to reciprocal moral scrutiny with other members, if (but only if) you profess the faith. By contrast, in the interpretivists' community, or at least in Luban and Simon's version of that community, member-

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426. *Id.* at 471.

427. MACKIE, *supra* note 74, at 22.

428. See Stick, *supra* note 181, at 369-70 (distinguishing between "fundamental objectivity" and "group objectivity").

ship is automatic and universal, or nearly so. What "we feel entitled to judge" you by is, implicitly at least, an ordering of values to which you might not subscribe.

Yet, if this is how membership in a moral community is to be understood, it is not clear what "intersubjective" means in such a community. It can hardly mean intersubjective in Mackie's sense of shared subjectivities, because membership in the community is not based on common commitments. It could mean intersubjective in the descriptive sense, that even those who do not subscribe to the dominant ethos can nevertheless recognize what it is and that it is dominant. But then how are the dominant norms applicable to, and morally binding upon, those who do not subscribe? If we make the relevant moral community coterminous with the political community, and if we make membership in the former a matter of birth, like membership in the latter, then we come back nearly full circle to the questions we addressed in the last section. Where the norms are unwritten and informally enforced, we virtually collapse morality into mores.<sup>429</sup> Where the norms are codified and are enforced by the state, we in effect subsume ethics under politics.

As Luban indicates, the "we" who are both morally in agreement and politically in power face the issue of using our political power to ensure that our moral will is done by the "they" who disagree morally and who are weaker politically. Faced with that problem, as we saw in the last section, the temptation is great to insist that those who are subject to our political clout are also subject to our moral judgments. For if they are so subject, we are not only physically able to coerce them. We are also morally entitled to condemn them, to say that they are bad, that their values are wrong, inadequate, or irrational. And if we are so entitled, then the Gordian knot of political legitimacy is unravelling, if not quite untied, and we need not cut it in the way I recommended in the last section.

But the response of those who disagree, and who are subject to our power, remains: "A plague on both your houses, political and moral." And if it is clear that we can coerce them to live with us in an undivided political house, it is not nearly so clear how we can ensure that they share our moral home. Moral secession is more difficult to suppress than political, precisely because the former

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429. Luban comes close to this in his generally favorable discussion of Aristotle's ethics. "[H]is view of morality," Luban approvingly notes, "is very closely related to what we think of as manners: It consists in acting in the appropriate way in various situations, and this will frequently be defined by the standards of the community in which one lives." Luban, *Epistemology*, *supra* note 112, at 652.

need not respond to the force of arms, a point that the force of arms itself proves in the limiting case of martyrdom. All the more reason on the part of the powerful, therefore, to declare the martyrs heretics. Heresy in theology, like error in morality, requires one true faith to which all are subject. The problem in both fields is the same: how to spread the frontiers of the faith and make subjects of the unconverted without the power of the sword.<sup>430</sup>

These issues would, of course, be moot if there were, as a matter of fact, universal agreement on matters of morality. Then, to paraphrase Mackie, we could cease to worry about objectivity, because subjective agreement would give us the intersubjective standards we need for reaching moral judgments.<sup>431</sup> Not surprisingly, Luban insists that there is in fact widespread, if not universal, agreement on basic moral values. "[I]n point of fact our society generally agrees about what the virtues are," because "[b]y and large we share the same moral models and ideals. . . . Thus, the theoretical problem raised above is not a real one."<sup>432</sup>

As a matter of fact, most of us do share certain basic values. We believe in human dignity and equality; we profess, if we do not always practice, a modicum of altruism; we grimace at gratuitous cruelty, if it occurs close enough to us. Furthermore, "we" includes not just readers of long law review articles, and certainly not just liberal readers. In this limited sense, what the fundamentalists insist on is true (if not quite for the reasons they think): our culture widely reflects Judeo-Christian values. Even as to basic values, however, the agreement is far from total. Luban himself points to several ethical subcultures in America,<sup>433</sup> and expresses fear that the religious enthusiasms of the fundamentalist fringe will infect our largely secular,

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430. This is why Salman Rushdie's declaration "I am not a Muslim" is so powerful, see SALMAN RUSHDIE, *In Good Faith*, in *IMAGINARY HOMELANDS* 405 (1991), and why his recent conversion is so problematic, see SALMAN RUSHDIE, *Why I Have Embraced Islam*, in *IMAGINARY HOMELANDS*, *supra*, at 430. For his latest twist of faith, see Salman Rushdie, Address at Columbia University (Dec. 11, 1991), in *N.Y. TIMES*, Dec. 12, 1991, at B8 (noting that "Actually Existing Islam" bears the same relation to his "humanized, historicized, and secularized way of being a Muslim" as the "Actually Existing Socialism" of the Soviet Union bore to "the utopia of peace and equality of which democratic socialists have dreamed").

431. See MACKIE, *supra* note 74, at 22-23.

432. Luban, *Epistemology*, *supra* note 112, at 657. Luban also asserts an extensive sharing of values in *Partisanship*, *supra* note 62, at 1023-25. See also BERLIN, *supra* note 260, at 18.

433. See Luban, *Paternalism*, *supra* note 424, at 462 (Hell's Angels); Luban, *Mid-Course Corrections*, *supra* note 52, at 454-55 ("the 'rugged individualists,' the libertarians, the survivalists, the Ayn Rand devotees"). Both the extreme oddity of these examples and the fact that he lists libertarians among them without distinction obscure the fact that his

egalitarian, and humanist political culture.<sup>434</sup>

Moreover, even if there is agreement at the most fundamental levels about what our common values are, agreement about what to include at the highest level of Luban's fourfold root analysis, that still leaves important areas of disagreement. Sometimes the implementation of basic values brings them into conflict with one another, requiring that we sacrifice or subordinate some values to others. We have seen particular instances of this in Part III: the trilemma of client perjury and the conflict between the old role morality and the new.

Competing fideist communities in contemporary American legal culture further evidence conflicts in values. In some ways the most obvious of these communities is the traditional bar, as exemplified by the ABA. Troubled by a decline in the values for which it stands, the ABA in 1986 promulgated a manifesto entitled *A Blueprint for Rekindling Lawyer Professionalism*.<sup>435</sup> "Professionalism" has become the central article of the ABA faith. It comprises the traditional lawyerly virtues: technical competence, deference to judges, and the problematic balance of client loyalty and public-spiritedness captured in the phrase "zealous advocacy within the bounds of the law."<sup>436</sup> That this professionalism crusade has a religious aura about it is evident from the documents it has generated: they are described as creeds of professionalism, and adherence is to be made in the form of oaths, pledges, and professions of belief.<sup>437</sup> There is, moreover, a commendable bit of anxiety, in some quarters of the ABA at least, about whether there is, or should be, one true faith.<sup>438</sup>

This concern accurately reflects the fact that other faiths, some

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"we" may not be as monolithic as he implies, as does his dismissal of anarchists with a droll anecdote in a footnote. See *id.* at 461 n.107.

434. See Luban, *Difference Made Legal*, *supra* note 71, at 2214.

435. See COMMISSION ON PROFESSIONALISM, AMERICAN BAR ASS'N, "... IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986) [hereinafter COMMISSION ON PROFESSIONALISM].

436. See Nancy J. Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773, 777-78 (reviewing COMMISSION ON PROFESSIONALISM, *supra* note 435); Ronald D. Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOY. U. CHI. L.J. 1149, 1151-59 (1987).

437. See 1 THE PROFESSIONAL LAWYER 12-13 (1989-90).

438. Though the ABA House of Delegates recommended in August 1988 that state and local bar associations "encourage their members to accept as a guide for their individual conduct, and to comply with, a lawyers' creed of professionalism," it has not promulgated such a creed of its own and it has insisted that such a creed not create legally enforceable obligations. See 1992 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 557 (Thomas Morgan & Ronald D. Rotunda eds., 1992). This may, of

militant, are afoot. Almost antipodal to the worldview of the ABA is that of scholars and practitioners allied with the Critical Legal Studies (CLS) movement. Here the shibboleth is not "professionalism" but "delegitimation," an effort not to restore a lost Eden of legal values but to usher in a millennium marked by the absence of hierarchy, and hence of alienation, in human relations.<sup>439</sup> An article in which New Leftist scholars of the CLS movement offer a theoretical account of the practical successes of Old Leftist practitioners in the National Lawyers' Guild (the ABA's ancient, self-appointed nemesis) concludes with the following call to fideist community:

Everything that we have said in this Article depends for its effectiveness on the development of a *movement* of lawyers who meet regularly to further develop the ideas we have begun to present here, and who give one another the strength to take the risks that a truly politicized law practice requires. The possibility of utilizing social conflict to transform the legal arena . . . cannot be realized through the efforts of isolated practitioners.

. . .

Any transformative movement of lawyers must thus begin with the formation of small working groups, where lawyers who already know each other can begin to discuss what possibilities exist in their local communities for delegitimizing legal work, and how they can develop a sense of collective support for one another's efforts.<sup>440</sup>

Perhaps at a very deep level the CLS folk and the ABA folk share a common set of values.<sup>441</sup> But in terms of even the most generalized practical goals, the CLS movement places itself in direct conflict with the "liberal-legalist" view of the legal system.<sup>442</sup> The one group salutes the standard of "professionalism"; the other "delegi-

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course, bespeak a reluctance to extend civil liability, not an anxiety over moral imperialism.

439. Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 370-75 (1982-1983).

440. *Id.* at 410-11; see also Letter from William H. Simon, Professor, Stanford University Law School, to author (July 29, 1991) (on file with author) (discussing William H. Simon & Robert W. Gordon, *The Redemption of Professionalism?*, in THE REDEMPTION OF PROFESSIONALISM? (Robert Nelson & David M. Trubek eds., forthcoming 1992) as "suggesting that professional responsibility rhetoric could best be elaborated in the context of affinity sub-groups of the bar a little like the ones you [Atkinson] mentioned," for example, "the Lawyer's Guild and the Association of the Bar of the City of New York").

441. Luban himself tries to find those common values. See Luban, *Legal Modernism*, *supra* note 73 (distinguishing CLS's "Neo-Kantian" emphases, which he finds compatible with liberalism, from its "avant-gardist" tendencies, which he does not).

442. Gabel & Harris, *supra* note 439, at 369-70.

timation." But members of each group are bound together by adherence to a common creed.<sup>443</sup>

Finally, remember our earlier discussion of Monroe Freedman and the Trial Lawyers.<sup>444</sup> Here there is evidence of far wider basic agreement among opponents. Freedman has been the law's loyal opposition; he has never, so far as I know, questioned the basic tenets of the "liberal-legalism" that the CLS movement rejects. And yet his disagreement with the ABA position has been profound. Moreover, it has spawned, or joined, rival communities. Some of these communities, including the one that promulgated Freedman's alternative to the ABA's Code, are large and formally organized;<sup>445</sup> others, like the one in which he initially came to his unorthodox positions, were small and informal.<sup>446</sup>

We must be clear on the point of these examples. They show that, at a very practical level, lawyers and legal scholars differ on values that are fundamental, or nearly so, and that those who share common values tend to coalesce into movements, even communities, that encompass less than all of the political state in which they operate. This is not to suggest, however, that members of these groups share a skeptical metaethic. Some, perhaps all, have among their members both interpretivists and realists. From the viewpoint of these members, those who are not members of the group are wrong, victims of false consciousness or some other contemporary analogue of what was formerly called an unregenerate heart. On my view, members of different groups are not wrong, they simply affirm different articles of faith. Either way, however, the fact remains that

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443. There is a curiously atavistic tendency to this factionalism. During the Reformation and Counter-Reformation, rival groups of Christians faced, and sometimes literally fought, one another under the direction of competing cadres of Calvinists on the one hand and Jesuits on the other. According to Michael Walzer, these are the prototypes of more modern, and secular, radical parties. See MICHAEL WALZER, *THE REVOLUTION OF THE SAINTS* 2 (1965). Moreover, despite the intensity of their opposition, there remained common values among them. Even Geneva and Rome could unite not just against atheists, but also against Anabaptists and Unitarians.

444. See *supra* notes 261-293 and accompanying text.

445. Two such examples are the American Trial Lawyers Foundation and the American Trial Lawyers Association. See *supra* text accompanying notes 261-272 (discussing Freedman's work on drafting the American Lawyer's Code of Conduct).

446. FREEDMAN, *supra* note 262, at vii-viii. Here again, a comparison with the Reformation era is illuminating. Lutherans and the followers of Zwingli and later Calvin could reach accord and make common cause on some issues of faith and practice, but not others; so, too, the Jansenists and the Jesuits on the Catholic side. This gave rise, on the Protestant side, to rival creeds and churches and, on the Catholic side, to very different emphases on different elements of a common culture by distinct factions within a single communion.

these competing ethical communities within the legal profession call into question the degree of moral agreement that Luban asserts.

But to hold myself to my own standard, I must not confuse the indicative with the imperative. To say that such communities exist is not to say that they are good, or that the kind of moral life possible within them is adequate, much less ideal. Here we come to the second objection to fideist community: that it is dangerous, a cure worse than the disease, or deficient, a theoretical edifice no one would want to call home. We must address normative criticisms of its adequacy from two directions, claims on the one hand that the demands of such communities on their members are too narrow, and the solidarity within them too shallow, and claims on the other hand that the demands of such communities are too wide, and the solidarity within them too deep. Both criticisms, at bottom, raise a common problem: fideist communities are voluntary communities, communities of believers.

There are several related arguments that fideist communities are too narrow. John Stick denounces the idea of basing community on freely chosen values as "the modern view of suburb as community," and declares it to be "desperately impoverished."<sup>447</sup> He envisions a world of windowless moral monads each undeflected in its own eccentric orbit by "a balance of respect and critical judgments for friends."<sup>448</sup>

Another criticism of fideist communities derives from an overly literal reading of what it means to say that their members share a creed. First, intellectual assent is notoriously easy to fake, and communities founded on that basis alone risk the most absolute form of superficiality, hypocrisy.<sup>449</sup> Moreover, there are problems even where belief is sincere. Creeds, after all, are verbal formulas, and communities based upon them run the dual risks of splitting into narrow sects based on detailed agreement or of flattening out into shallow latitudinarianism. Compounding that, they run the risk of a

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447. Stick, *supra* note 181, at 394.

448. *Id.* at 395. This objection is reminiscent of C.S. Lewis's mock-diabolical advice on the subversion of churches:

the parochial organisation [sic] should always be attacked, because, being a unity of place and not of likings, it brings people of different classes and psychology together in the kind of unity the Enemy [God] desires. The congregational principle, on the other hand, makes each church into a kind of club, and finally, if all goes well, into a coterie or faction.

C.S. LEWIS, *THE SCREWTAPE LETTERS* 81 (1943).

449. Duncan Kennedy aptly captured this problem in comparing such spurious catechisms to the pod people of *Invasion of the Body Snatchers*. See Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 *STAN. L. REV.* 1, 7 (1984).



more profound shallowness—that their members share only a common agreement on principles, not a genuine concern for each other as people.

Yet to the extent that they emphasize emotional rather than intellectual ties among their members, fideist communities run the opposite risk. Instead of holding themselves at the arms' length of contractarian handshakes, their members may smother themselves in the all-encompassing embrace of undifferentiated affection. For the windowless moral monads of Stick's suburbanism, they risk substituting the homesick hemispheres of Aristophanes,<sup>450</sup> longing to lock one another in a libidinally charged return to oneness.<sup>451</sup>

Both these critiques, that fideist community is too narrow and that it is too broad, are normative critiques; they question whether communities based on voluntarily adopted positions are good, even in the minimal sense of providing a form of moral life that you or I could accept. Before I address those questions, I need to address an even more fundamental question: whether it is possible to join and remain in or leave such communities in the way that I, and both the normative critiques, assume. This last criticism is more radical than the other two, because it calls into question the "can" that the "ought" of fideism implies. The normative claims of fideism rest on this descriptive reality about human personality, that one can transcend the values of the moral community in which one is raised. The contrary view is that all moral communities, not just the overly erotic fideist communities, preclude the very kind of choice on which membership in fideist communities is supposed to be based. To struggle against contextuality is not just futile, but misconceived, because we are inescapably a product of the moral communities in

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450. PLATO, *Symposium*, in GREAT DIALOGUES OF PLATO 85-88 (Eric H. Warmington & Philip G. Rouse eds., W.H.D. Rouse trans., 1956) [hereinafter PLATO]; cf. West, *supra* note 370, at 859 (noting importance to Critical Legal Studies and feminist jurisprudence of a "[c]apacity for connectedness and the memory of oneness").

451. Luban accurately assesses this danger of communities based on "love" rather than "respect," though he follows the all-too-common practice of citing the excesses of the sixteenth century Muensterite community as typical of the generally peaceable Anabaptists. See Luban, *Difference Made Legal*, *supra* note 71, at 2204. As Roland H. Bainton reports,

Despite the fact that for the first ten years under frightful prosecution [the Anabaptists] had been without offense, yet when a handful of the fanatics ran amuck the entire party was besmirched with the excesses of the lunatic fringe, and well into the nineteenth century historians of the Reformation did little more than recount the aberrations of the saints rampant.

Bainton, *supra* note 183, at 106 (1952). For a sympathetic contemporary account, see JOHN H. YODER, *THE POLITICS OF JESUS* 157 (1972).

which our values were formed.<sup>452</sup>

I cannot give an account here of fideist community that fully meets these objections. What I can give is a vision of what such a community would be like, and an example of such a community in our midst. The point will be to sketch the possibility of such a community, and to suggest that membership within it would permit an acceptable moral life. To be a fideist community, it must be one in which loyalty to that community stands above obedience to the political community, in which the obligations of ethics are superior to those of politics. To answer the normative criticisms of that community, it must be a community in which love and respect are coordinated. Finally, to satisfy the descriptive criticism, it must offer a means of transcending and transforming the broader cultural and political community of which both it and its members are part.

For my vision of such a community, I draw upon Weinrib's admittedly unorthodox interpretation of the *Crito*.<sup>453</sup> According to Weinrib, the *Crito* is best understood as a dialogue primarily about friendship and only secondarily about political obligation. Indeed, the account of political obligation that Plato, in writing the dialogue, and Socrates, within the dialogue itself, place in the mouths of the personified Laws of Athens is not to be taken as either Plato's or Socrates's position on communal life. The model for communal life, even political life, is to be friendship, and friendship as revealed in the interactions of Socrates and his friend Crito in the dialogue.

On these basic points I agree with Weinrib over against the orthodox interpretation, which holds that Socrates's beliefs are reflected in the position of the Laws. I differ with Weinrib, however, on the elaboration of these points, in three particular directions: Socrates's understanding of friendship generally, his particular friendship with Crito, and the political implications of friendship. According to Weinrib, Crito is Socrates's "unphilosophical friend."<sup>454</sup> His level of philosophical sophistication is low; "Crito loved Socrates although he did not understand what he was about."<sup>455</sup> Accordingly, to console his unphilosophic friend, Socrates answered Crito's specious arguments for escape in terms that Crito could understand, even though the reasons he gave Crito were

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452. See Luban, *Mid-Course Corrections*, *supra* note 52, at 443 (following UNGER, *supra* note 88, at 36).

453. Ernest J. Weinrib, *Obedience to the Law in Plato's CRITO*, 27 AM. J. JURIS. 85 (1982).

454. *Id.* at 104.

455. *Id.*

not the reasons he himself found persuasive.<sup>456</sup>

Weinrib demonstrates well Crito's lack of technical competence and argumentative skill, even of substantive understanding. But these are not the marks of true philosophy; if they were, the sophists would be the great philosophers. Philosophy is rather, and quite literally, the love of wisdom, the willingness to engage in discussions of the things that really matter, things like human excellence. These are the very things, Socrates reminded Crito in the beginning of the dialogue, to which they had devoted their lives together.<sup>457</sup> In that sense, philosophers are friends of each other, for in engaging in dialogue about the things that really matter, they show reciprocal concern for each other's souls, the things that matter most.

It is in this, not in technical competence, that Crito fails both as a philosopher and as a friend. As a philosopher, his problem is less that he is intellectually unable to follow the arguments, and more that he is not sufficiently willing to try. Over and over again, Socrates faults Crito not for failing to understand him, but for failing to engage him.<sup>458</sup> The failure is not so much of reason as of will. This same flaw infects his friendship as well. Crito focuses upon himself, upon the harm that will befall him in Socrates's death, rather than on the danger to Socrates.<sup>459</sup> And even as to himself, he overlooks the real harm, which is not in what others will think or in his personal sadness, but in the loss of an interlocutor, a fellow philosopher. Crito is a flawed philosopher for precisely the same reason he is a flawed friend.

And yet he is both a real philosopher and a real friend. He is, after all, with Socrates in the time of crisis, and he has, after all, resolved with Socrates to deal with this ultimate issue as they have all others, by mutual discussion. The dialogues, as Weinrib himself reminds us, are something other than, and more than, treatises; what is done in them is at least as important as what is said.<sup>460</sup>

Weinrib may well be right that Socrates put forward the Laws' political arguments for the benefit of his friend Crito, as the only demonstration intelligible to Crito that his staying to die was consistent with their way of living, with following the course dialogue reveals to be the better. Yet, I think the connection between the

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456. *Id.* at 104, 108.

457. PLATO, *Crito*, *supra* note 70, at 57.

458. *Id.* at 59.

459. *Id.* at 52-53.

460. Weinrib, *supra* note 453, at 87-88; see also James B. White, *The Ethics of Argument: Plato's GORGIAS and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 850-52 (1983).

flawed arguments and Socrates's concern for Crito is closer than Weinrib realizes. Crito needed specious arguments not because he could not understand the truth, but because the truth would have shattered him. For the truth is that, had Crito been a better friend, and hence a better philosopher, he might have refuted the specious arguments and accomplished his original purpose, the deliverance of Socrates from unjust death at the hands of the many.

It is this radical interdependence of friendship and philosophy, and the dramatic consequences of its failure, that Plato is showing us. If Plato succeeds, we can see what Crito could not: As Crito was distracted though he purported to be listening, so Socrates purported to be more distracted than persuaded by the Laws' arguments,<sup>461</sup> both with disastrous results. And we can see that the ultimate and most dangerous distraction is not the rush of events, which presses us toward precipitous action, but the opinions of the many, which pull us away from reflection with friends.

In this as in all his dialogues, Plato means to draw us in, to make us philosophers, members of the community of Socrates's friends.<sup>462</sup> As such, we become responsible for the argument,<sup>463</sup> and, in the *Crito*, responsible for Socrates's very life. What was fundamental to Socrates was not obedience to law, but dialogue with his friends, a class that included all those willing to engage in his reciprocally respectful form of inquiry. As he explicitly told Crito in the beginning, it was conversation with his friends that determined how he lived his life;<sup>464</sup> as Plato implicitly tells us, this was true to the very end.

Here we have, in outline, a fideist community that meets the two normative criticisms. On the one hand, Socrates is anything but lacking in "a balance of respect and critical judgment for friends."<sup>465</sup> Reciprocal concern for fellow members of the community is the very foundation of the community. Yet, on the other hand, though this concern is as deep as death, it does not excuse disregard for other members' individual integrity. Even Crito, for all his want of philosophical sophistication, did not attempt to kidnap Socrates. Rather, the very form of expression of friendly concern, dialogue, demands that the other not be coerced.<sup>466</sup>

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461. PLATO, *Crito*, *supra* note 70, at 65.

462. Weinrib, *supra* note 453, at 87-88.

463. White, *supra* note 460, at 865-66.

464. PLATO, *Crito*, *supra* note 70, at 55.

465. Stick, *supra* note 181, at 395.

466. So it was, perhaps, that Thrasymachus, who had to be forced to stay and discuss

What, then, of the transcendence issue? Even if such communities would be an acceptable expression of moral life, can they exist? Through membership in such a community, can we really call into question the moral foundations of the community in which we were raised? The standard answer of Platonists, of course, has been "yes." By careful examination, we can rationally transcend the opinions of the many, the realm of appearances, and rise to the level of truth, in moral as in metaphysical and other matters. This interpretation of Plato is realism at its root.<sup>467</sup> As such, it is hardly consistent with my skeptical premises.

There is, however, another interpretation of Plato's dialogues, one that gives us a means of transcendence that is consistent with metaethical skepticism. Consider James Boyd White's account of Socrates's way of life:

Socrates would typically seek out a person who claimed to know how to do something . . . and ask his interlocutor his central questions: who are you, what do you do, and what do you know? Since we all know how to do things that we cannot explain, about which we have never thought beyond saying "I am a banker" or "I am a surgeon," this line of questioning has the result of making conscious what before was not, the relation between self and culture. I am a football coach or a law professor, I say, but only then, when for Socrates this is not a sufficient answer, do I begin to realize that this identity is a cultural one, not necessary but chosen, and chosen by me without my wholly knowing or understanding it. In the ensuing conversation the interlocutor's account of himself and of his motives is shown to make no sense even in its own terms; it is seen to be internally inconsistent. The one who claims to know, knows nothing after all. This is the *elenchus* or refutation of which Socrates repeatedly speaks, and it is the heart of dialectic.

. . . The effect of this process is to disturb the relation between self and language, to break down the sense of natural connection and coherence between them. One comes suddenly to see both self and language as uncertain, as capable of being remade in relation to each other. The true aim of a dialogue that works this way . . . is nothing less than the shared reconstitution of self and language.<sup>468</sup>

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his position that might makes right, never became a meaningful participant in PLATO, *THE REPUBLIC* (Allan Bloom trans., 1968).

467. Singer, *supra* note 47, at 29 n.92; OLAFSON, *supra* note 81, at 4; MACKIE, *supra* note 74, at 23; BERLIN, *supra* note 260, at 5-6.

468. White, *supra* note 460, at 851-52 (footnote omitted).

More often than not, Socrates is unable to accomplish this aim with his interlocutor in the dialogue. Yet Plato's purpose in holding out this possibility to us through the text is to achieve such a relationship with us in fact. On White's view, then, the proof of transcendence does not occur in the text; at most the text gives an example of what transcendence would be like. "[The reader] becomes a self outside his culture . . . [and] is led to see that what is at stake when he decides how to speak and what to say . . . is nothing less than 'who he is' and what kind of community he will have with others."<sup>469</sup> The proof of the possibility of transcendence is in us, in what we do and become in response to the text.

Consistent with, if not implicit in, the fideist community that White finds in Plato's dialogues is an understanding of the relationship between the individual and the community that I want to claim for the fideist community I recommend as the basis for legal ethics. This understanding bears upon the community being transcended, the individual doing the transcending, and their relationship. The community being transcended must produce more than the language by which it is transcended, more even than the individuals capable of transcending it. It must also produce the very qualities of mind and will by which it is transcended and out of which those who transcend it build the new community into which they move.<sup>470</sup> Contrary to a myth prevalent in our individualist culture, Abe Lincoln was not born in a log cabin he built with his own hands. Self-made men and women are quite literally inconceivable. If this is what those who question the possibility of transcendence are denying, they have my entire agreement.

With this point in mind, we can give a deeper answer to a worry raised above, that of fideist ethics giving rise to extremes of narcissism. I have said that fideist community is one corrective, in that it requires attending to the words of one's fellows. Could not a member of such a community, however, immodestly claim credit for having chosen to become a member, for having succeeded as a reader of Plato where other readers and where Socrates's interlocutors within the dialogue have failed? Yes, but if what I have just said about the preconditions of such membership is true, then such a claim would be evidently out of place. You cannot enable yourself to become a member of this community, any more than you can

469. *Id.* at 871.

470. This is a point that even the most extreme defenders of the moral and metaphysical importance of individual choice, the existentialists, affirm in their insistence upon "facticity." OLAFSON, *supra* note 81, at 169-70.

cause your own membership in the community where accident of birth places you. You can take pride in where you come from, but you can hardly take credit for it. You can read the dialogues of Plato with understanding; you cannot have written them.<sup>471</sup>

The theological concept of grace captures this attitude nicely, if, in its original context, too narrowly. This is what Paul means when he writes the Ephesian church, "by grace are ye saved through faith, and that not of yourselves, it is the gift of God, lest any man should boast."<sup>472</sup> More succinctly, it is what Jesus referred to when he said "Except a man be born again, he cannot see the kingdom of heaven."<sup>473</sup> And if grace leaves no room for smugness, so it provides no foundation for complacency. Having been the objects of grace, we are called to become the means of grace for others; that is what it means to be a part of the community into which we are called. In the context of Christian theology, that involves turning from one's old way of life to the way revealed in one's encounter with the Gospel;<sup>474</sup> in the context of the Platonic dialogues, it involves engaging in and being responsible for shaping with your friends your most fundamental commitments.

But can my reinterpretation of Socratic community as imagined by Plato among the Athenian theory class serve as a model for prac-

471. A still deeper danger is that of vainglorying in one's humility, the besetting sin of the kind of Calvinist Robert Burns satirized. See Robert Burns, *Holy Willie's Prayer*, in 2 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE, *supra* note 106, at 95-97.

472. *Ephesians* 2:8-9 (Revised Standard).

473. *John* 3:3 (Revised Standard). When faced with the despairing response of one who took him both too literally and too self-reliantly—"How can a man be born when he is old? Can he enter a second time into his mother's womb and be born?" *John* 3:4—Jesus replied: "The wind blows where it wills, and you hear the sound of it, but you do not know whence it comes or whither it goes; so it is with every one who is born of the Spirit." *John* 3:8.

474. THE PHILOSOPHY OF PAUL RICOUER 239-45 (Charles E. Reagan & David Stewart eds., 1978). It is reasonably clear, at least in the epistles attributed to Paul, that this includes living in a mutually supportive community with fellow believers. See, e.g., *Ephesians* 4:1-16 (Revised Standard). There is, in contrast, deep division among Christians on the role that moral law plays in the life of the Christian, and there is a vast literature on the issue. It is fair to infer that I favor an antinomian reading of Paul's Epistle to the Galatians over a "higher law" reading of Matthew's account of the Sermon on the Mount, *Matthew* 5, 6, 7. It is not quite accurate, however, to suggest that this is to prefer the ethics of Paul to that of Jesus. Cf. Luban, *Difference Made Legal*, *supra* note 71, at 2193-99, 2201-05. Matthew's Gospel is generally regarded as the most legalistic, the most concerned to show the continuity between Jesus's teachings and those of the contemporary rabbinical community, which was dominated by the sect of the Pharisees after the fall of the Temple in 70 Common Era. NORMAN PERRIN, *THE NEW TESTAMENT: AN INTRODUCTION* 169-75 (1974).

ting lawyers today?<sup>475</sup> To see how it can, consider Monroe Freedman's description of the genesis of his heterodox positions on legal ethics:

About fifteen years ago, I began engaging in serious discussions of legal ethics with a small number of other lawyers, most of whom were also doing criminal defense work. We found that we were all attempting to cope with some vexing ethical dilemmas, each in his or her own way, and that sharing our experiences and talking them out helped us considerably in attempting to resolve our difficulties, even though, in a number of respects, we continued to disagree.<sup>476</sup>

The key features of Freedman's community closely parallel the Socratic model I have sketched. The number of members was small, not because it was exclusive, but because it included people who cared deeply for one another and shared common concerns.<sup>477</sup> For this reason, their occasional disagreement did not produce schism. Their community rested not on subscription to a detailed creed, but on common commitment to shared values—and to each other. This interaction both sharpened their intellectual comprehension and strengthened their moral resolve. It helped them not only to define their position theoretically, but also to be themselves morally. If personal integrity is essential to maintaining a moral position, as both Luban and I believe, then your most morally important interlocutors will be those who know you, and who care for you, personally.

This is a good example of fideist community,<sup>478</sup> but it is not a perfect one. There is, most obviously, a danger of parochialism. It is not clear what the attitude of Freedman's group was toward those with diametrically opposed views, or toward those who, though cognizant of the kind of problems Freedman and his friends faced, were removed from the daily demands of criminal defense practice and thus able to give a broader, not to say better, perspective. But if

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475. This is White's point as well, though he is more sympathetic than I to the old role morality. See White, *supra* note 460, at 873-94.

476. FREEDMAN, *supra* note 262, at vii-viii.

477. See ARISTOTLE, *supra* note 292, at 269 ("But to be a friend of many people is impossible, if the friendship is to be based on virtue or excellence and on the character of our friends.").

478. Another example is the Enlightenment, especially in France. See LEONARD KRIEGER, *KINGS AND PHILOSOPHERS, 1689-1789*, at 170-73 (1970) (suggesting that sociability played a central role in maintaining the coherence of the mature Enlightenment in the third quarter of the eighteenth century).



Freedman's group did not include such members, it does not appear in principle or in spirit to have ignored them.<sup>479</sup>

Furthermore, Freedman's group certainly had the interests of nonmembers as a central concern; its inward focus was to help its members in their efforts on behalf of criminal defendants. Quite conceivably, such a group might, more generally, concern itself with working toward a more just criminal justice system or, still more generally, a more just society. Such a society might, indeed, be a political community that incorporates the very kinds of mutual dialogue and deference that characterize their fideist community.<sup>480</sup> This goal, of course, would involve the tacit admission that less-inclusive fideist communities are not the ultimately desirable form of human social intercourse.<sup>481</sup>

But if we must be careful not to confuse the kind of community that is now possible with that toward which we may work, we must also be wary of the opposite confusion: the suggestion that our present political community is entitled to claim our moral allegiance. The effort to liberalize the ABA's client confidentiality rules suggests of our profession<sup>482</sup> what the public choice theorists suggest about our larger political community:<sup>483</sup> mutual dialogue in

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479. An example of a community of lawyers that included nonlawyers in the way that I suggest here is the Abolitionist bar, which drew upon the larger Abolitionist community for moral support and guidance. See COVER, *supra* note 138; *supra* note 127 and accompanying text; *supra* note 130 and accompanying text.

480. Drucilla Cornell calls for reconstituting the political community along very much these lines, under what she calls "the virtue of civic friendship." See Cornell, *supra* note 103, at 359-78.

481. See UNGER, *supra* note 369, at 220-22; see also Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 22 n.96 (1986) ("[I]f the appeal of [the civil] republican vision is restricted to cases of small, homogeneous communities, it has little contemporary significance for American constitutional law or theory.").

482. Luban describes the culmination of that process, which produced rules extremely protective of confidentiality in the corporate as well as the criminal defense context, as "a shoot-out in the ABA." LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 180-85. As he points out, the Model Rules as drafted by the Kutak Commission "contained some significant morally activist elements, but many of these were blown away in the ensuing political fracas." Luban, *Partisanship*, *supra* note 62, at 1007 n.12; see also Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989) (tracing the six year process by which the ABA developed its latest ethics code for lawyers).

483. Daniel A. Farber & Philip P. Frickey conveniently summarize the public choice theorists' pessimistic views of representative government but hold out their own hope of greater public spiritedness on the part of both representatives and their constituents. See Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987). The trouble with that hope, however, is that, as we have seen, visions of the public good vary. I seriously doubt that the views of those who prevailed in the passage

the collective interest is a goal more easily expressed than achieved. Nor is it clear that acting as if that goal were already achieved will make its realization more likely.

To live without absolutes is not to live without purpose, and to have a purpose not founded on absolutes is not to be the willful manchild skepticism's critics bemoan. The fideist alternative I have identified permits you to renounce morally binding principles derived from involuntary membership in the accidental populace of a particular state or culture and to embrace binding relations with freely chosen fellows in a smaller, voluntary community of friends.<sup>484</sup>

### CONCLUSION

The Old Masters' invention of the vanishing point, the point in which parallel lines are made to converge, was a great aesthetic advance. It made painting look like the world as it appeared, and thus it satisfied a thirst for truth with a taste of verisimilitude. So Luban and Simon's assumption of a common moral order, an assumption hardly unique to them, fills a similar yearning in the sphere of ethics, a yearning for a consistent moral cosmos. But our yearning for ultimate ethical order may be misplaced, and the traditional image may be not just confining, but distorting as well. Conscientiously held orderings of values, even among secular egalitarian humanists, may simply fail to converge on critical issues of legal ethics, including that most basic issue, how a good person can be a good lawyer.

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of the ABA Model Rules were all shaped entirely by venality; the problem is that their views, however sincerely held, are radically at variance with my (and Luban's) own.

484. The suggestion that legal ethics can be founded upon friendship among like-minded lawyers should not be confused with Charles Fried's effort to ground legal ethics on an analogy between the lawyer-client relationship and friendship. Fried, *supra* note 2, at 1071. Fried's critics have shown his analogy to be strained at best. See Dauer & Leff, *supra* note 290, at 573-80. Others make the more cautious suggestion that something like Socratic friendship can form the lawyer-client relationship. See White, *supra* note 460, at 893; Simon, *Ideology*, *supra* note 12, at 135; Simon, *supra* note 182, at 488-89; SHAFFER, *supra* note 2, at 21-33.

By contrast, the friendship to which I point among lawyers is quite literal, as the examples of Socrates and Freedman attest. This is not to say that lawyers and clients may not be friends, that lawyers in the model of legal ethics I propose would not be deeply committed to and respectful of their clients, or that lawyers should not engage in dialogue with their clients. It is, however, to say that the values that guide your conduct as a lawyer, including your conduct on behalf of clients, will be those of your friends, not those of your clients. *But cf.* Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 U.C.L.A. L. REV. 1101, 1103 (1990) ("The role-driven obligation of poverty lawyers to care for a community of clients restricts the representational choices available on behalf of any individual client.").

If this is so, no flask fashioned from the stuff of public norms can contain the new wine of lawyers' individual moral responsibility that Luban and Simon have given us. This new wine must be drunk, and not drunk alone, in nihilistic despair or narcissistic self-indulgence, but sacramentally, in congregations of those who believe in shared goals, and celebratorily, in symposia whose members are bound together by their friendship with one another. Rather than resign ourselves to the hemlock of obedience to the state, we who adhere to a fideist creed must sometimes heed the advice of Crito: bribe the guard, and flee for sanctuary to the friends of friends, even to lawless Thessaly.<sup>485</sup>

This is not to say that Socrates was wrong to take the poison. It is, rather, to suggest that Socrates's life, like the *Crito*, is not primarily about political obligation, or even moral obligation, but about personal commitment—commitment, in Socrates's case, to practical discussion with his fellows, particularly with his friends. From this perspective, Socrates's primary message to Crito, who loved him, and Plato's message to us, who would follow him, is not that we are to obey the laws unless we can change them, but that we should be committed to following the considered advice of our friends, unless we can dissuade them. Thus the tragedy of the *Crito* is not that the Athenian assembly convicted and executed Socrates on false charges, but that his friends failed to rebut his fallacious defense of political obligation. And the triumph is that he submitted, not to the wrong though legal verdict of the jury, but to the conscientious though flawed conclusions of his friends. If the Gospel is to be believed, you can have no greater love than to lay down your life for your friends.<sup>486</sup>

Socrates's death, we are fond of saying, was the vindication of his life; I am saying so too, and not in a particularly original way. But if skepticism is right, there is no other way. Ultimately, then, I must put my argument to you that way too. It is not a fashionable way; for realists and interpretivists, it is even a bit embarrassing. I cannot say that it is the one true way, as the realists can, or even that it is the best reading of the way of our culture, as the interpretivists can. All I can say is that it is a viable—literally, a livable—way; ultimately, that it is my way. This is not to say, however, that it is merely idiosyncratic. Quite the contrary; I have been at considera-

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485. See PLATO, *Crito*, *supra* note 70, at 53-54.

486. See *John* 15:13 (Revised Standard).

ble pains to show that it is consistent with both secular egalitarian humanism and the insights of Judeo-Christian theology.

On skeptical metaethical premises there is, of course, no one true way. I have been necessarily sketchy about the content of my particular brand of fideism. But as we have seen, it has two critical components: commitment to dialogue with friends about how to live, and humility at being able to participate in such dialogue. If this Article is to be faithful to that creed and conducive to the kind of community it calls for, you and I must share, in the quaint language of the Dialogues, concern for each other's souls.<sup>487</sup>

Saint Socrates, intercede for us.

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487. See White, *supra* note 460, at 894 (concluding with a call for continued dialogue); Luban, *Partisanship*, *supra* note 62, at 1043 (calling for scholarly inquiry in the Socratic spirit).